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IN THE

Supreme Court of the United States

No. ——

Supreme Court, U. S.
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JEROME MILLER, Individually and as Director of THE DEPARTMENT OF CHILDREN AND FAMILY SERVICES and THE DEPARTMENT OF CHILDREN AND FAMILY SERVICES of the STATE OF ILLINOIS,

Appellants,

vs.

MARCEL YOUAKIM and LINDA YOUAKIM individually and as foster parents, TIMOTHY ROBERTSON, a minor, by his sister and next friend LINDA YOUAKIM, MARY LOU ROBERTSON, a minor, by her sister and next friend LINDA YOUAKIM, LARRY ROBERTSON, a minor by his sister and next friend LINDA YOUAKIM, and SHERRY ROBERTSON, a minor, by her sister and next friend LINDA YOUAKIM, and all others similarly situated,

Appellees.

On Appeal From the United States Court of Appeals for the Seventh Circuit

JURISDICTIONAL STATEMENT

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DATE: November 23, 1977.

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JEROME MILLER, Individually and as Director of THE DEPARTMENT OF CHILDREN AND FAMILY SERVICES and THE DEPARTMENT OF CHILDREN AND FAMILY SERVICES of the STATE OF ILLINOIS,

Appellants,

vs.

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Appellees.

On Appeal From the United States Court of Appeals for the Seventh Circuit

JURISDICTIONAL STATEMENT

Appellants Jerome Miller and the Illinois Department of Children and Family Services appeal from the judgment of the United States Court of Appeals for the Seventh Circuit entered September 27, 1977, which affirmed the orders entered by the United States District Court for the Northern District of Illinois on July 27 and August 24, 1976. It is submitted that this Statement demonstrates that the Supreme Court of the United States has jurisdiction of the Appeal and that the federal question presented is substantial.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit entered September 27, 1977 (Appendix B) is not yet reported. The memorandum opinion of the district court rendered July 27, 1976, which is reproduced as an appendix to the decision of the court of appeals, is reported at 431 F. Supp. 40 (N.D. Ill.). The judgment order of the district court entered August 24, 1976 (Appendix C) is not reported. The opinion of the Supreme Court of the United States rendered in this cause on March 31, 1976 (Appendix D) is reported at 425 U.S. 231, 47 L. Ed. 2d 701. The opinion of the three judge district court originally assigned to hear this cause, rendered on February 28, 1974 (Appendix E), is reported at 374 F. Supp. 1204 (N.D. Ill.).

JURISDICTION

Appellees brought a civil rights action alleging jurisdiction under 28 U.S.C. §§ 1343 (3), (4), 2281 and 2284, to enjoin the enforcement of Ill. Rev. Stat., 1971, ch. 23, §§ 2212.05, 2212.17 and 5005 as violative of the United States Constitution and the Social Security Act. On September 27, 1977, the United States Court of Appeals for the Seventh Circuit affirmed the district court's determination that the Illinois statutes violated the Social Security Act

and the supremacy clause of the United States Constitution. On November 3, 1977, appellants filed a notice of appeal in the court of appeals. (Appendix F) The jurisdiction of the Supreme Court of the United States to review this decision by appeal is conferred by 28 U.S.C. § 1254(2). *City of Detroit* v. *Murray Corp.*, 355 U.S. 489, 2 L. Ed. 2d 2441 (1958); *Watson* v. *Employers Liability Assurance Corp. Ltd.*, 348 U.S. 66, 99 L. Ed. 74 (1954).

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED

The following Illinois statutes were invalidated by the court of appeals.

Ill. Rev. Stat., 1971, Ch. 23, § 2212.05:

> **2212.05 Facility for child care, defined.]** § 2.05. "Facility for child care" or "child care facility" means any person, group of persons, agency, association or organization, whether established for gain or otherwise, who or which receives or arranges for care or placement of one or more children, unrelated to the operator of the facility, apart from the parents, with or without the transfer of the right of custody in any facility as defined in this Act, established and maintained for the care of children.

Ill. Rev. Stat., 1971, Ch. 23, § 2212.17:

> **2212.17 Foster family home and types of homes, defined.]** § 2.17. "Foster family home" means a facility for child care in residences of families who receive no more than 8 children unrelated to them, unless all the children are of common parentage, for the purpose of providing family care and training for the children on a full-time basis. The family's own children, under 18 years of age, shall be included in determining the maximum number of children served. The term "foster family home" includes homes receiving chil-

dren from any State-operated institution for child care; or from any agency established by a municipality or other political subdivision of the State of Illinois authorized to provide care for children outside their own homes. The types of foster family homes are defined as follows:

(a) "Boarding home" means a foster family home which receives payment for regular full-time care of a child or children.

(b) "Free home" means a foster family home other than an adoptive home which does not receive payments for the care of a child or children.

(c) "Adoptive home" means a foster family home which receives a child or children for the purpose of adopting the child or children.

(d) "Work-wage home" means a foster family home which receives a child or children who pay part or all of their board by rendering some services to the family not prohibited by the Child Labor Law or by standards or regulations of the Department prescribed under this Act. The child or children may receive a wage in connection with the services rendered the foster family.

(e) "Agency-supervised home" means a foster family home under the direct and regular supervision of a licensed child welfare agency, of the Department of Children and Family Services, of a circuit court, or of any other State agency which has authority to place children in child care facilities, and which receives no more than 8 children, unless of common parentage, who are placed and are regularly supervised by one of the specified agencies.

(f) "Independent home" means a foster family home, other than an adoptive home, which receives no more than 4 children, unless of common parentage, directly from parents, or other legally responsible persons, by independent arrangement and which is not subject to direct and regular supervision of a specified agency except as such supervision pertains to licensing by the Department.

Ill. Rev. Stat., 1971, Ch. 23, § 5005, which is reproduced in Appendix A.

The following pertinent provisions are also reproduced in Appendix A:

U.S. Const., Art. VI, § 2;

42 U.S.C. § 601;

42 U.S.C. § 602(a)(20);

42 U.S.C. § 606;

42 U.S.C. § 607(a);

42 U.S.C. § 608;

45 C.F.R. § 233.90(c)(1)(v) (1975).

QUESTION PRESENTED

Whether the Illinois statutory foster care scheme, which provides monetary foster care benefits on behalf of children living only with persons unrelated to them, is consistent with the purpose and meaning of the AFDC foster care program under the Social Security Act, and is therefore consistent with the supremacy clause of the United States Constitution?

STATEMENT OF THE CASE

As part of the federal program for Aid to Families with Dependent Children, the State of Illinois provides federally subsidized foster care payments (AFDC-FC) of up to $105 per month for a dependent child living in a foster family home or child care institution (42 U.S.C. § 608). Under the Illinois Child Care Act, the state will not grant foster care payments to persons who are related to the children for whom they care. Ill. Rev. Stat., 1971, Ch. 23, § 2212.17. Instead persons related to dependent children are eligible to receive payments of $63 per month under the state's basic AFDC program. However, as an exception to its general policy, the State of Illinois will supplement payments to persons caring for related dependent children upon a showing of need, which may bring the total AFDC payments to $105 per child.

Appellees in this case are Marcel and Linda Youakim, husband and wife, and Timothy, Mary Lou, Larry and Sherry Robertson, Linda Youakim's minor brothers and sisters. In 1969, the minor appellees were declared wards of the state, and since that time, Larry and Sherry Robertson have been living at unrelated foster care facilities. Since 1972, the Youakims have provided a home for Timothy and Mary Lou after signing a Relative Home Placement Agreement in which they agreed to provide for these children's physical, mental, emotional and spiritual needs. The Youakims were found ineligible to receive AFDC-FC payments of $105 per month for each child because they are related to Timothy and Mary Lou, but were instead found eligible for assistance under the basic AFDC program.[1]

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1. Since 1974, the Youakims have received supplemental payments for the care of Timothy and Mary Lou, and they now receive monthly payments totaling $105 for each child.

On March 13, 1973, appellees filed a civil rights class action pursuant to 42 U.S.C. § 1983 in the United States District Court for the Northern District of Illinois against the Illinois Department of Children and Family Services and Jerome Miller, its former director. Jurisdiction of the district court was invoked under 28 U.S.C. §§ 1343(3), (4), 2281 and 2284 because the appellees challenged the validity of Illinois statutes. On April 2, 1973, appellants filed their motion to strike and dismiss. In their Second Amended Complaint filed January 21, 1974, appellees alleged that because they could not receive regular AFDC-FC payments at the prevailing $105 rate, appellees could neither provide adequate care for Timothy and Mary Lou, nor consider bringing Larry and Sherry into the Youakim home. Appellees further contended that the Illinois foster care scheme violates the equal protection clause of the Fourteenth Amendment to the United States Constitution because it authorizes foster care payments to unrelated foster parents but refuses to allow foster care payments to persons related to the children for whom they care. Appellees asked the court to enjoin appellants from enforcing Ill. Rev. Stat., ch. 23, §§ 2212.05, 2212.17, and the Department's Placement Manual, ch. 5, § 3, as violative of the equal protection clause.

The parties stipulated that appellants' motion to dismiss could stand as to the amended complaint. A three-judge court was convened pursuant to appellees' request, and on February 28, 1974, the three-judge court granted appellants' motion to dismiss. The court specifically found that the Illinois scheme did not violate appellees' right to equal protection.

On April 23, 1974, appellees filed their Notice of Appeal to the United States Supreme Court. In their jurisdictional statement, appellees not only raised their equal protection

challenge, but also claimed that the Illinois foster care scheme is inconsistent with the Social Security Act and, therefore, violates the supremacy clause. The Supreme Court noted probable jurisdiction on March 17, 1975, and on March 31, 1976, the Court vacated and remanded the judgment of the three-judge district court. The Supreme Court stated that the supremacy clause issue was not presented to the three-judge court as a separate ground for decision. In addition, the Court noted that after the filing of appellees' jurisdictional statement but before probable jurisdiction was noted, the Department of Health, Education and Welfare (HEW) issued a "Program Instruction" which stated that the AFDC-FC rate applied "regardless of whether or not the foster care home is operated by a relative." In light of these factors, the Supreme Court felt that the district court should be given an opportunity to rule on appellees' supremacy clause claim.

On remand, appellees filed a motion for preliminary injunction and summary judgment on June 10, 1976 and appellants filed a cross motion for summary judgment on June 14, 1976. On July 27, 1976, the district court, acting through a single judge, granted appellees' motion for summary judgment. The court found that the Illinois foster care statutes, (Ill. Rev. Stat., 1971, ch. 23, §§ 2212.05, 2212.17 and 5005) were repugnant to §§ 401 and 408 of the Social Security Act (42 U.S.C. §§ 601, 608) and to the supremacy clause of the United States Constitution. At the same time, the court found it unnecessary to reach the equal protection issue. On August 24, 1976, the court enjoined appellants from enforcing the Illinois statutes insofar as those statutes excluded persons related to foster children from eligibility under the AFDC-FC program.

In addition to other relief not relevant here, the court ordered appellants to make full AFDC-FC payments to otherwise eligible foster parents who currently have related foster children living with them.

On August 24, 1976, appellants filed their notice of appeal to the seventh circuit from the district court orders. On September 27, 1977, the court of appeals rendered its opinion affirming, with slight modification, the orders entered by the district court.

On November 3, 1977, appellants filed a notice of appeal to this Honorable Court from the decision of the court of appeals (Appendix F).

ARGUMENT

THE ILLINOIS STATUTORY FOSTER CARE SCHEME IS CONSISTENT WITH THE PURPOSE AND MEANING OF THE SOCIAL SECURITY ACT, AND DOES NOT VIOLATE THE SOCIAL SECURITY ACT OR THE SUPREMACY CLAUSE OF THE UNITED STATES CONSTITUTION. THE NATIONWIDE RAMIFICATIONS OF THE COURT OF APPEALS' CONTRARY INTERPRETATION REQUIRES PLENARY CONSIDERATION BY THE SUPREMF COURT OF THE UNITED STATES.

Section 408 of the Social Security Act constitutes the federal foster care welfare program (AFDC-FC, 42 U.S.C. § 608). Under the Act, all states participating in the federal Aid to Families with Dependent Children welfare program (AFDC, 42 U.S.C. § 601 *et seq.*) must provide foster care benefits in accordance with § 408 [42 U.S.C. § 602(a)(20)] This case concerns whether Congress, after it initially provided AFDC benefits under § 406 to children living with related persons, intended the subsequently enacted § 408 foster care program to apply only to needy dependent children living with persons unrelated to them. Illinois child care statutes, like the welfare statutes in a number of other states, limit foster care welfare assistance to needy dependent children living with non-related persons. To invalidate the Illinois statutes, the court of appeals had to ignore both the overall purpose and meaning of the federal welfare statute, as well as the legislative history underlying the enactment of the foster care program.

1. Under the plain meaning of the Social Security Act, foster care constitutes only non-related care. The eligibility requirements for participation in the federal foster care

program are set forth in § 408(a). This section describes a "needy dependent child" as one who (a) is removed by court order from the home of a parent or specified relative because continuation there would be contrary to his welfare, (b) is placed under the responsibility of a state or local agency which meets requirements not relevant here, (c) is placed in a foster family home or child care institution, and (d) has been receiving AFDC or was eligible to receive AFDC at the time the court proceedings were initiated or within six months prior to the time judicial proceedings began. As is apparent, § 408(a) does not expressly include or exclude from foster care assistance needy dependent children who are placed with relatives.

Likewise, the definition of a "foster family home" in § 408 does little to clarify whether, for purposes of the Act, the concept of foster care includes related care:

> For purposes of this section, the term "foster family home" means a foster family home for children which is licensed by the State in which it is situated or has been approved, by the agency of such State responsible for licensing homes of this type, as meeting the standards established for such licensing. (42 U.S.C. § 608)

This definition is ambiguous because the statute uses the phrase "foster family home" to define that term. Hence, it is both necessary and appropriate to examine other sections of the federal welfare scheme in order to determine the meaning and scope of the § 408 foster care program. *Philbrook* v. *Glodgett*, 421 U.S. 707, 713, 44 L. Ed. 2d 525, 532-33 (1975).

Section 406 (42 U.S.C. § 606) is critical to a proper understanding of the federal foster care program, and clearly establishes that § 406 was intended to provide assistance for related care while § 408 was intended to provide assistance

only for unrelated care. Section 406 embodies the basic program for aid to needy families with dependent children. In relevant part, § 406 requires that to qualify for the basic AFDC program, (a) the needy child must be deprived of parental support due to the death, continued absence, or physical or mental incapacity of a parent, and (b) the child must reside with a parent or a specified relative.[2] There is no dispute in this case that appellees have satisfied both criteria, and that they are eligible for assistance under the § 406 basic AFDC program.

In contrast to the basic federal assistance program, § 408 describes a needy dependent child as one who would meet the requirements of § 406 (or § 407), except that he has been removed by judicial order from the home of a § 406 relative and has been placed in a "foster family home" or in a "child-care institution." Needy dependent children who are removed, with or without a court order, from the home of one § 406 relative and placed in the home of another § 406 relative are now, and always have been, entitled to AFDC assistance. *See* 45 C.F.R. § 233(c)(1)(v)(B) Consequently, the more recently enacted § 408 foster care benefits could only have been intended to reach a group of children not previously entitled to federal welfare assistance—that is, needy dependent children who are placed in unrelated homes. The fact that Congress explicitly provided benefits to children living with relatives under § 406 is strong evidence of a congressional intent that removing a child from one relative's home and placing the child in an-

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2. Section 407 expands the basic AFDC program to include a needy child who is deprived of parental support due to the unemployment of his father and who is residing with a parent or specified relative. 42 U.S.C. § 607.

other relative's home is *not* placing the child in a foster family home. See *Burns* v. *Alcala*, 420 U.S. 575, 43 L. Ed. 2d 469, 477, n. 10 (1975).

As recognized in *Burns*, the basic AFDC program covered only those needy children living with parents or specified relatives. A child removed from the home of a parent or relative because of abuse, neglect, or other unsuitable condition, and subsequently placed in the home of a non-related person simply could not obtain aid under § 406. In response to this problem, Congress enacted the § 408 AFDC foster care program so that children who could not live with a parent or specified relative, and who had to live with a non-relative, could nevertheless obtain federal financial assistance. Again, since the § 406 basic AFDC program authorizes aid for children placed with a relative, it is clear that the § 408 foster care program provides benefits only to those needy children not living with relatives. *Burns* implicitly supports this viewpoint:

> The Act now authorizes, in addition to payments for children in the homes of designated relatives, foster care payments for children who have been removed from the homes of relatives. 420 U.S. 575, 582 n. 9, 43 L. Ed. 2d 469, 476.

2. The legislative history of the § 408 foster care program supports the position that foster care means non-related care. As noted, federal benefits have been available to children living in the homes of parents or relatives since the origin of the Social Security Act in 1935. In 1961, however, Congress recognized that even though the objective of the federal welfare program is to provide cash assistance for needy children in their own homes, that is, in the home of a parent or close relative,

> there are some home environments that are clearly contrary to the best interests of these children. . . . Often, however, remedial action on behalf of the child

> was not possible. We believe that this undesirable situation could be avoided, in many instances, if assistance under this program were available for the care of the child in a foster family home when such care is necessary. (S. Rep. No. 165, 87th Cong., 1st Sess. (1961) U.S. Cong. & Adm. News, V. 2, 1721)

In explaining the enactment of the temporary foster care provision, the Senate Committee on Finance stated:

> The foster care provisions in your committee's bill have been designed, insofar as possible, to safeguard the rights of the child and his parents or relatives. No one takes lightly the severance, even for a brief period, of the ties between a child and parent, *or somebody closely related to him. At the same time,* an effort has been made to write into the law provisions which would stimulate and assist the States in the *protection and care of children.* (S. Rep. 165, 87th Cong., 1st Sess. (1961) U.S. Cong. & Adm. News, V. 2, 1722) (emphasis added)

Again, in summarizing the various components of the AFDC program, the Senate Committee noted in 1962 that,

> Prior to present temporary provision which will expire June 30, 1962, no Federal participation was authorized for children in foster care since program was limited to children living in home of a parent or a relative of the degree noted above. (Hearings Before Committee on Finance, U.S. Senate, 87th Cong., 1st Sess., on H.R. 10606, Public Assistance Act of 1962, p. 16).

Commenting on the desirable features of the foster care program, the Senate Committee noted in its 1962 report that the foster care program gave "the States an alternative to leaving the children in unsuitable homes or caring for them elsewhere without Federal participation in the cost." S. Rep. No. 1589, 87th Cong., 2d Sess. (1962) U.S. Cong. & Adm. News, V. 1, 1954. A like sentiment was expressed in the Senate Committee's report on amendments which would expand eligibility under the § 408 program:

> There is some evidence that courts may be reluctant to place a child in foster care because Federal funds are not available (and the cost of the care must come out of local funds in many areas) unless the child is *in the home of a specified relative* [who is receiving AFDC payments on behalf of the child]. The proposed change would make the cost of caring for children in foster care subject to Federal sharing if the child has been placed in foster care by a court order (if the child is removed from the home of a relative as a result of judicial determination that continuation in such home would be contrary to his welfare) and if the child would have been eligible for aid under the AFDC program if an application had been made on his behalf. (S. Rep. No. 744, 90th Cong., 1st Sess. (1967) U.S. Cong. & Adm. News, V. 2, 3001) (emphasis added).

Clearly, if foster care placement was viewed as placement with a relative, the courts would not have hesitated to place a child in foster care, since federal funds would have been available. Instead, the courts' reluctance stemmed from the fact that foster care placement meant placement in unrelated homes, with the consequent loss of federal assistance. In giving the courts a welcome option under the § 408 foster care program, Congress was obviously concerned with the welfare and economic necessities of needy children placed with unrelated persons.

Testimony offered by advocates of the foster care provisions likewise demonstrates that the § 408 foster care program, as popularly understood, provided coverage only for those children living with persons unrelated to them. As noted in the recommendations of the Ad Hoc Committee on Public Welfare appointed to serve the Secretary of Health, Education and Welfare:

> The amendment to title IV which provides payments to children in foster homes is a significant departure

> from the earlier exclusive stress in this program on children living with parents or relatives. Hearings before Committee on Finance, U.S. Senate, 87th Cong., 1st Sess., on H.R. 10606, Public Assistance Act of 1962, p. 83.

Even more significantly, the Welfare Committee of the National Association of County Officials noted:

> In our opinion, a needy child in a foster home is equally as deserving and needy as one of an unemployed parent or one who has a parent *or relative* to reside with, thereby making him eligible for ADC aid. Id. at 344 (emphasis added).

All of the foregoing forcefully demonstrates that the legislative history and plain meaning of the Social Security Act indicate that Congress intended that § 406 provide assistance only for needy children living with specified relatives while § 408 provides assistance only for needy children living with non-relatives.

3. In construing §408 to mean that foster care includes related care, the court of appeals wholly failed to consider both § 406 and the fact that Congress had already provided federal assistance for persons situated like the appellees under the basic AFDC program. The court instead placed exaggerated emphasis on the provision of § 408 that "the term 'foster family home' means a foster family home . . . which is licensed by the State . . . or has been approved . . . as meeting the standards established for such licensing." 42 U.S.C. § 608. The court found that the minor appellees had been placed in foster care in part because, according to the court, the Relative Home Placement Agreement between the instant parties indicates that appellants *approved* the Youakim home for the care of a *foster* child (App. B, 8). This agreement form was originally a Foster Home Placement Agreement. To adapt the form for use in a related care situation, appellants attempted to delete all references to the word "foster" and in some places substitute the word "relative." Of the fourteen references to "foster," appellants failed to strike that word in one place, and obviously such failure resulted from administrative inadvertence. Yet the court relied on this single instance as proof that the Youakim home was approved as a foster home. This determination was made despite the fact that there is no showing in the Record that the Youakims ever met the licensing standards required for approval of the home.

More importantly, the court's undue focus on the licensing or approval requirements under § 408, as well as the court's discussion of the "facts" surrounding the Relative Home Placement Agreement are simply not responsive to the basic question presented here. At issue is whether, for federal welfare purposes, homes maintained by relatives of needy dependent children are to be considered foster family homes. Once this question is answered, § 408 becomes relevant by requiring that such home be licensed by the state as a foster home or approved as meeting the standards for licensing.

4. The practical result of the court's decision is the judicial creation of a special group of beneficiaries like the appellees who are eligible for aid under both § 406 and § 408. By concentrating on the language of only § 408, and by avoiding any discussion of § 406, the court never confronted this very real problem.

Additionally, the court of appeals' interpretation of the foster care provision renders § 408(f) meaningless in circumstances like the present. Under § 408(f), once a child

is removed from the home of a parent or relative, the state must take further remedial measures. Thus, the state foster care plan must:

> (f) include[s] provision for (1) development of a plan for each such child (including periodic review of the necessity for the child's being in a foster family home or child-care institution) to assure that he receives proper care and that services are provided which are designed to improve the conditions in the home from which he was removed or to otherwise make possible his being placed *in the home of a relative* specified in section 606(a) of this title. 42 U.S.C. § 608(f) (emphasis added)

This section clearly indicates that foster care is only temporary care. Foster care must be terminated whenever the child can be returned to the home of his parent or relative with whom he was living or placed in the home of another § 406 relative. If foster care constitutes care provided by relatives, it makes no sense that a child should be removed from the "foster care" of one relative and placed with another relative. Yet, the states are mandated under § 408(f) to remove the child from a foster care placement and must place the child in another relative's home as soon as possible.

While the court of appeals rejected appellants' position respecting § 408(f), the court did not definitively interpret that subsection. Rather, the court could only state that three other interpretations are "plausible." (App. B, 13) In offering one such "plausible" explanation of § 408(f), the court noted that the language of that subsection does not literally prevent payment of foster care benefits to persons related to the children for whom they care. (App. B, 16) Like the court's earlier emphasis on the fact that relatives are not literally excluded from coverage under § 408, this lack of exclusionary language in § 408(f) is

simply not proof that related homes are to be considered foster homes. The seventh circuit's "departure from ordinary principles of statutory interpretation is not supported by [this] Court's prior decisions." *Burns* v. *Alcala*, 420 U.S. 575, 580, 43 L. Ed. 2d 469, 475 (1975).

Furthermore, the adverse impact of the court of appeals' decision on needy dependent children covered by the Act may be far-reaching. Federal assistance is provided under § 406 to encourage relatives to voluntarily care for children who can no longer reside with their parents. By providing foster care aid under § 408 to children living with relatives, such relatives would have no incentive to care for children under the § 406 plan. Because more financial benefits are available under the § 408 foster care program, the court's decision creates a financial incentive for relatives to refrain from caring for needy children until the children have been removed from their homes by court order. This procedure, given its possible traumatizing effects, can never be in the best interests of the child.

5. Other factors likewise show the necessity for plenary consideration by this Honorable Court. After the three-judge court originally empaneled ruled that the Illinois statute did not violate the equal protection clause [*Youakim* v. *Miller*, 374 F. Supp. 1204, 1210 (N.D. Ill. 1974)] appellees filed a Jurisdictional Statement in this Honorable Court raising the same issue present here. After considering the briefs and hearing oral argument, this Court found that the supremacy clause issue was not raised as a separate ground for decision. The Court vacated the original judgment and remanded the cause for consideration of the supremacy clause issue. *Youakim* v. *Miller*, 425 U.S. 231, 237, 47 L. Ed. 2d 701, 707 (1975). This substantial issue has now been aired in the lower court, and it stands ready for review by this Court.

In addition, the instant decision of the court of appeals stands at apparent odds with the decision of the three-judge district court which originally heard this case. Judge Tone,[3] writing for the unanimous district court, stated:

> Far from being inconsistent with the federal scheme, the Illinois scheme in general seems to parallel it. (footnote omitted) The federal statute authorizes aid to the natural parents and relatives of dependent children in one section, 42 U.S.C. § 606, and aid to foster parents in another, 42 U.S.C. § 608. . . . Thus the federal statute makes the same classification as the Illinois statute. *Youakin* v. *Miller,* 374 F. Supp. 1204, 1210 (D. Ill. 1974).

Indeed, this Court recognized in *Youakim* that:

> Had appellants [appellees here] relied on the Supremacy Clause issue as a separate ground for decision it would appear that the claim would have been rejected by the District Court. 425 U.S. 231, 235, 47 L. Ed. 2d 701, 706.

The vacillating position of HEW respecting the scope of the § 408 foster care program further underscores the need for resolution by this Court of the question presented here. Responding to an inquiry by the Illinois Department of Public Aid as to whether § 408 foster care payments could be made to children living with relatives, HEW originally stated in a letter written in 1971 that:

> Federal participation would not be available in such payments. Title IV of the Federal Act distinguishes between AFDC and AFDC Foster Care by providing

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3. Also sitting on the three judge panel were the Honorable John Paul Stevens, formerly of the United States Court of Appeals for the Seventh Circuit and the Honorable Abraham L. Marovitz of the United States District Court for the Northern District of Illinois.

> (1) for assistance in behalf of needy children living with specified relatives and (2) for assistance under specified circumstances on behalf of children removed from the home of a specified relative and placed in a foster family home or child-care institution.

In 1974, HEW adopted an opposite position favoring appellees. (See *Youakim,* 421 U.S. 231, 235, 47 L. Ed. 2d 701, 706). Agency interpretations which conflict with earlier pronouncements rendered closer to the enactment of a particular statute should be given little weight. *General Electric Co.* v. *Gilbert,* 429 U.S. 125, 50 L. Ed. 2d 343, 358-59 (1976). HEW's difficulty in arriving at a consistent interpretation of the § 408 AFDC-FC program provides one more persuasive ground for the plenary consideration of this case.

Finally, while the invalidation of Illinois statutes by the court of appeals is in itself significant, the impact of the decision will be felt far beyond the State of Illinois. Other states have similarly interpreted § 408 as providing foster care benefits only to needy children living with persons unrelated to them.[4] Presumably, the court's decision also effectively invalidates the legislation enacted by those states.

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4. These states include Alabama, Arizona, California, Minnesota, New Mexico and North Carolina.

CONCLUSION

For the foregoing reasons, appellants believe that the instant case presents a substantial federal question which has nationwide importance. Therefore, appellants respectfully urge this Honorable Court to give this case its plenary consideration and to reverse the decision of the court of appeals.

Respectfully submitted,

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APPENDIX A

APPENDIX A

U.S. Const., Art. VI, § 2:

> This Constitution, and the laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

42 U.S.C. § 601:

> **§ 601. Authorization of appropriations**
>
> For the purpose of encouraging the care of dependent children in their own homes or in the homes of relatives by enabling each State to furnish financial assistance and rehabilitation and other services, as far as practicable under the conditions in such State, to needy dependent children and the parents or relatives with whom they are living to help maintain and strengthen family life and to help such parents or relatives to attain or retain capability for the maximum self-support and personal independence consistent with the maintenance of continuing parental care and protection, there is authorized to be appropriated for each fiscal year a sum sufficient to carry out the purposes of this part. The sums made available under this section shall be used for making payments to States which have submitted, and had approved by the Secretary, State plans for aid and services to needy families with children.
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> • • •
>
> Aug. 14, 1935, c. 531, Title IV, § 401, 49 Stat. 627; 1946 Reorg. Plan No. 2, § 4, eff. July 16, 1946, 11 F.R. 7873, 60 Stat. 1095; 1953 Reorg. Plan No. 1, §§ 5, 8, eff. Apr. 11, 1953, 18 F.R. 2053, 67 Stat. 631; Aug. 1, 1956, c. 836, Title III, § 312(a), 70 Stat. 848; July 25, 1962, Pub. L. 87-543, Title I, § 104(a)(4), (c)(2), 76 Stat. 185, 186; Jan. 2, 1968, Pub. L. 90-248, Title II, § 241(b)(1), 81 Stat. 916.

42 U.S.C. § 602 provides in pertinent part:

§ 602. State plans for aid and services to needy families with children; contents; approval by Secretary

(a) A State plan for aid and services to needy families with children must

• • •

(20) effective July 1, 1969, provide for aid to families with dependent children in the form of foster care in accordance with section 608 of this title:

42 U.S.C. § 606:

§ 606. Definitions

When used in this part—

(a) The term "dependent child" means a needy child (1) who has been deprived of parental support or care by reason of the death, continued absence from the home, or physical or mental incapacity of a parent, and who is living with his father, mother, grandfather, grandmother, brother, sister, stepfather, stepmother, stepbrother, stepsister, uncle, aunt, first cousin, nephew, or niece, in a place of residence maintained by one or more of such relatives as his or their own home, and (2) who is (A) under the age of eighteen, or (B) under the age of twenty-one and (as determined by the State in accordance with standards prescribed by the Secretary) a student regularly attending a school, college, or university, or regularly attending a course of vocational or technical training designed to fit him for gainful employment;

(b) The term "aid to families with dependent children" means money payments with respect to, or (if provided in or after the third month before the month in which the recipient makes application for aid) medical care in behalf of or any type of remedial care recognized under State law in behalf of, a dependent child or dependent children, and includes (1) money

payments or medical care or any type of remedial care recognized under State law to meet the needs of the relatives with whom any dependent child is living (and the spouse of such relative if living with him and if such relative is the child's parent and the child is a dependent child by reason of the physical or mental incapacity of a parent or is a dependent child under section 607 of this title), and (2) payments with respect to any dependent child (including payments to meet the needs of the relative, and the relative's spouse, with whom such child is living, and the needs of any other individual living in the same home if such needs are taken into account in making the determination under section 602(a)(7) of this title) which do not meet the preceding requirements of this subsection, but which would meet such requirements except that such payments are made to another individual who (as determined in accordance with standards prescribed by the Secretary) is interested in or concerned with the welfare of such child or relative, or are made on behalf of such child or relative directly to a person furnishing food, living accommodations, or other goods, services, or items to or for such child, relative, or other individual, but only with respect to a State whose State plan approved under section 602 of this title includes provision for—

(A) determination by the State agency that the relative of the child with respect to whom such payments are made has such inability to manage funds that making payments to him would be contrary to the welfare of the child and, therefore, it is necessary to provide such aid with respect to such child and relative through payments described in this clause (2);

(B) undertaking and continuing special efforts to develop greater ability on the part of the relative to manage funds in such manner as to protect the welfare of the family;

(C) periodic review by such State agency of the determination under clause (A) to ascertain whether conditions justifying such determination still exist, with provision for termination of such payments if they do not and for seeking judicial appointment of a guardian or other legal representative, as described in section 1311 of this title, if and when it appears that the need for such payments is continuing, or is likely to continue, beyond a period specified by the Secretary;

(D) aid in the form of foster home care in behalf of children described in section 608(a) of this title; and

(E) opportunity for a fair hearing before the State agency on the determination referred to in clause (A) for any individual with respect to whom it is made;

(c) The term "relative with whom any dependent child is living" means the individual who is one of the relatives specified in subsection (a) of this section and with whom such child is living (within the meaning of such subsection) in a place of residence maintained by such individual (himself or together with any one or more of the other relatives so specified) as his (or their) own home.

(d) The term "family services" means services to a family or any member thereof for the purpose of preserving, rehabilitating, reuniting, or strengthening the family, and such other services as will assist members of a family to attain or retain capability for the maximum self-support and personal independence.

(e)(1) The term "emergency assistance to needy families with children" means any of the following, furnished for a period not in excess of 30 days in any 12-month period, in the case of a needy child under the age of 21 who is (or, within such period as may be specified by the Secretary, has been) living with any of the relatives specified in subsection (a)(1) of this

section in a place of residence maintained by one or more of such relatives as his or their own home, but only where such child is without available resources, the payments, care, or services involved are necessary to avoid destitution of such child or to provide living arrangements in a home for such child, and such destitution or need for living arrangements did not arise because such child or relative refused without good cause to accept employment or training for employment—

(A) money payments, payments in kind, or such other payments as the State agency may specify with respect to, or medical care or any other type of remedial care recognized under State law on behalf of, such child or any other member of the household in which he is living, and

(B) such services as may be specified by the Secretary; but only with respect to a State whose State plan approved under section 602 of this title includes provision for such assistance.

(2) Emergency assistance as authorized under paragraph (1) may be provided under the conditions specified in such paragraph to migrant workers with families in the State or in such part or parts thereof as the State shall designate.

Aug. 14, 1935, c. 531, Title IV, § 406, 49 Stat. 629; Aug. 10, 1939, c. 666, Title IV, § 403, 53 Stat. 1380; Aug. 28, 1950, c. 809, Title III, Pt. 2, § 323(a), 64 Stat. 551; Aug. 1, 1956, c. 836, Title III, §§ 321, 322, 351(b), 70 Stat. 850, 855; July 25, 1962, Pub. L. 87-543, Title I, §§ 104(a)(3)(D), 108(a), 109, 152, 156(b), 76 Stat. 185, 189, 190, 206, 207; Oct. 13, 1964, Pub. L. 88-641, § 2(a), 78 Stat. 1042; July 30, 1965, Pub. L. 89-97, Title IV, § 409, 79 Stat. 422; Jan. 2, 1968, Pub. L. 90-248, Title II, §§ 201(f), 206(b), 207(a), 241(b)(5), 81 Stat. 880, 893, 916.

42 U.S.C. § 607 provides in pertinent part:

§ 607. Dependent children of unemployed fathers; definition

(a) The term "dependent child" shall, notwithstanding section 606(a) of this title, include a needy child who meets the requirements of section 606(a)(2) of this title, who has been deprived of parental support or care by reason of the unemployment (as determined in accordance with standards prescribed by the Secretary) of his father, and who is living with any of the relatives specified in section 606(a)(1) of this title in a place of residence maintained by one or more of such relatives as his (or their) own home.

42 U.S.C. § 608:

§ 608. Payment to States for foster home care of dependent children; definitions

Effective for the period beginning May 1, 1961—

(a) the term "dependent child" shall, notwithstanding section 606(a) of this title, also include a child (1) who would meet the requirements of such section 606(a) or of section 607 of this title except for his removal after April 30, 1961 from the home of a a relative (specified in such section 606(a) as a result of a judicial determination to the effect that continuation therein would be contrary to the welfare of such child, (2) whose placement and care are the responsibility of (A) the State or local agency administering the State plan approved under section 602 of this title, or (B) any other public agency with whom the State agency administering or supervising the administration of such State plan has made an agreement which is still in effect and which includes provision for assuring development of a plan, satisfactory to such State agency, for such child as provided in paragraph (f)(1) and such other provisions as may be necessary to assure accomplishment of the objectives of the State plan approved under section 602 of this title, (3) who has been placed in a foster family home or child-care institution as a result of such determination, and (4) who (A) received aid under such State plan in or for the month in which court proceedings leading to such determination were initiated, or (B)(i) would have received such aid in or for such month if application had been made therefor, or (ii) in the case of a child who had been living with a relative specified in section 606(a) of this title within 6 months prior to the month in which such proceedings were initiated, would have received such aid in or for such month if in such month he had been living with (and removed from the home of) such a relative and application had been made therefor;

(b) the term "aid to families with dependent children" shall, notwithstanding section 606(b) of this title, include also foster care in behalf of a child described in paragraph (a) of this section—

(1) in the foster family home of any individual, whether the payment therefor is made to such individual or to a public or nonprofit private child-placement or child-care agency, or

(2) in a child-care institution, whether the payment therefor is made to such institution or to a public or non-profit private child-placement or child-care agency, but subject to limitations prescribed by the Secretary with a view to including as "aid to families with dependent children" in the case of such foster care in such institutions only those items which are included in such term in the case of foster care in the foster family home of an individual.

(c) the number of individuals counted under clause (A) of section 603(a)(1) of this title for any month shall include individuals (not otherwise included under such clause) with respect to whom expenditures were made in such month as aid to families with dependent children in the form of foster care; and

(d) services described in paragraph (f)(2) of this section shall be considered as part of the administration of the State plan for purposes of section 603 (a)(3) of this title; but only with respect to a State whose State plan approved under section 602 of this title—

(e) includes aid for any child described in paragraph (a) of this section, and

(f) includes provision for (1) development of a plan for each such child (including periodic review of the necessity for the child's being in a foster family home or child-care institution) to assure that he receives proper care and that services are provided which are designed to improve the conditions in the home from which he was removed or to otherwise make possible his being placed in the home of a relative specified in section 606(a) of this title, and (2) use by the State or local agency administering the State plan, to the maximum extent practicable, in placing such child in a foster family home or child-care institution, of the services of employees, of the State public-welfare agency referred to in section 722(a) of this title (relating to allotments to States for child welfare services under sections 721 to 728 of this title) or of any local agency participating in the administration of the plan referred to in such section, who perform functions in the administration of such plan.

For purposes of this section, the term "foster family home" means foster family home for children which is licensed by the State in which it is situated or has been approved, by the agency of such State responsible for licensing homes of this type, as meeting the standards established for such licensing; and the term "child-care institution" means a non-profit private child-care institution which is licensed by the State in which it is situated or has been approved, by the agency of such State responsible for licensing or approval of institutions of this type, as meeting the standards established for such licensing.

Aug. 14, 1935, c. 531, Title IV, § 408, as added May 8, 1961, Pub. L. 87-31, § 2, 75 Stat. 76, and amended July

25, 1962, Pub. L. 87-543, Title I, §§ 101(b)(2)(D), 104 (a)(3)(F), (G), 131(b), 135(a)-(d), 155(a), 76 Stat. 180, 185, 193, 196, 197, 207; Jan. 2, 1968, Pub. L. 90-248, Title II, §§ 201(e)(4), 205(c), 81 Stat. 880, 892.

Ill. Rev. Stat., 1971, ch. 23, § 5005:

5005. Direct child welfare services.] § 5. To provide direct child welfare services when not available through other public or private child care or program facilities.

For purposes of this Section:

The term "children" means persons found within the State who are under the age of 18 years at the time of acceptance for service or care. The term also includes children under age 18 and children age 18 or more but under age 21 who (1) are in foster care under order of a court and (2) were, at any time before August 1, 1969, recipients of foster care under Sections 6-4 or 12-8.6 of "The Illinois Public Aid Code", approved April 11, 1967, as amended.[1]

The term "child welfare services" means public social services which supplement or substitute for parental care and supervision for the purpose of: (1) preventing or remedying or assisting in the solution of problems which may result in the neglect, abuse or exploitation of children; (2) protecting and caring for homeless, dependent or neglected children; (3) protecting and promoting the welfare of children, including the strengthening of their own families and counseling of family members; (4) providing adequate care of children away from their homes, where needed, in foster family homes or day care or other child care facilities; or (5) providing counseling for mentally retarded, physically, and socially handicapped children and their parents when not otherwise available.

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1. Chapter 23, §§6-4, 12-18.6.

The Department shall establish and maintain tax-supported child welfare services and extend and seek to improve voluntary services throughout the State, to the end that services and care shall be available on an equal basis throughout the State to children requiring such services.

For the purpose of insuring effective state-wide planning, development, and utilization of resources for the day care of children, operated under various auspices, the Department is hereby designated to coordinate all day care activities for children of the State and shall:

(1) Develop a comprehensive day-care plan for the State which identifies high-priority areas and groups, relating them to available resources, and identifying the most effective approaches to the use of existing day care services. The plan shall include methods and procedures for the development of additional day care resources for children to meet the goal of reducing short-run and long-run dependency and to provide necessary enrichment and stimulation to the education of young children. Recommendation shall be made for State policy on optimum use of private and public, local, state and federal resources. A written plan shall be submitted to the Governor, annually, on January 1, and shall include an evaluation of developments over the preceding year, including cost-benefit analyses of various arrangements.

(2) The Department shall conduct day care planning activities within the following priorities:

(a) development of voluntary day care resources wherever possible, with the provision for grants-in-aid only where demonstrated to be useful and necessary as incentives or supports;

(b) emphasis on service to children of recipients of public assistance where such service will allow training or employment of the parent toward achieving the goal of independence;

(c) maximum employment of recipients of public assistance in day care centers and day care homes, operated in conjunction with short-term work training programs;

(d) care of children from families in stress and crises whose members potentially may become, or are in danger of becoming, non-productive and dependent;

(e) expansion of family day care facilities wherever possible;

(f) location of centers in economically depressed neighborhoods, preferably in multi-service centers with cooperation of other agencies;

(g) use of existing facilities free of charge or for reasonable rental wherever possible in lieu of construction.

(3) Based on its planning activities, the Department shall actively stimulate the development of public and private resources at the local level. It shall also seek the fullest utilization of federal funds directly or indirectly available to the Department.

(4) Where appropriate, existing non-governmental agencies or associations shall be involved in planning by the Department.

The Department shall establish rules and regulations concerning its operation of programs established to meet these purposes, including but not limited to adoption, foster care, family counseling, protective services, service to unwed mothers, homemaker service, return of runaway children, and interstate services.

The Department may provide financial assistance, and shall establish rules and regulations concerning such assistance, to persons who adopt physically or mentally handicapped, older and other hard-to-place children who immediately prior to their adoption were legal wards of the Department. The amount of assistance may vary, depending upon the needs of the child and the adoptive parents, but must be less than the monthly cost of care of the child in a foster home. Special purpose grants are allowed where the child requires special service but such costs may not exceed the amounts which similar services would cost the Department if it were to provide or secure them as guardian of the child.

The Department shall accept for care and training any child who has been adjudicated neglected or dependent committed to it pursuant to the "Juvenile Court Act".[2] The Department may, at its discretion except for those children also adjudicated neglected or dependent, accept for care and training any child who has been adjudicated delinquent or as a minor in need of supervision, under the "Juvenile Court Act", but no such child shall be committed to the Department by any court without the approval of the Department.

The Department may assume temporary custody of any child (1) if it has received a written consent to such temporary custody signed by the parents of the child or by the parent having custody of the child if the parents are not living together or by the guardian or custodian of the child if the child is not in the custody of either parent or (2) if the child is found in the State and neither a parent, guardian nor custodian of the child can be located. The Department shall have the authority, responsibilities and duties that a legal custodian of the child would have pursuant to Section 1-12 of the "Juvenile Court Act".[3] A parent,

2. Chapter 37, § 701-1 et seq.
3. Chapter 37, § 701-12.

guardian or custodian of a child in the temporary custody of the Department who would have custody of the child if he were not in the temporary custody of the Department may deliver to the Department a signed request that the Department surrender the temporary custody of the child. The Department may retain temporary custody of the child for 10 days after the receipt of the request, during which period the Department may cause to be filed a petition pursuant to the "Juvenile Court Act". If a petition is so filed, the Department shall retain temporary custody of the child until the court orders otherwise. If a petition is not filed within the 10 day period, the child shall be surrendered to the custody of the requesting parent, guardian or custodian not later than the expiration of the 10 day period, at which time the authority and duties of the Department with respect to the temporary custody of the child shall terminate. The Department may place children under 18 years of age in licensed child care facilities when in the opinion of the Department, such placement would be for their best interest. Payment for board, clothing, care, training and supervision of any child placed in a licensed child care facility may be made by the Department, by the parents or guardians of the estates of those children, or by both the Department and the parents or guardians, except that no payments shall be made by the Department for any child placed in a licensed child care facility for board, clothing, care, training and supervision of such a child that exceed the average per capita cost of maintaining and of caring for a child in institutions for dependent or neglected children operated by the Department. However, such restriction on payments does not apply in cases where children require specialized care and treatment for problems of severe emotional disturbance, physical disability, social adjustment, or any combination thereof and suitable facilities for the placement of such children are not available at payment rates within the limitations set forth in this Section.

The Department may receive and shall use, in its entirety, for the benefit of children any gift, donation or bequest of money or other property which is received on behalf of such children, or any financial benefits to which such children are or may become entitled while under the jurisdiction or care of the Department.

Amended by P.A. 76-2041, § 1, eff. July 1, 1970; P.A. 77-1374, § 1, eff. Aug. 31, 1971.

45 C.F.R. § 233.90(c)(1)(v):

§ 233.90. Factors specific to AFDC

• • •

(c) *Federal financial participation.* (1) Federal financial participation under title IV-A of the Social Security Act in payments with respect to a "dependent child", as defined in section 406(a) of the Act, is available within the following interpretations:

(v) *"Living with [a specified relative] in a place of residence maintained • • • as his • • • own home".* (A) A child may be considered to meet the requirement of living with one of the relatives specified in the Act if his home is with a parent or a person in one of the following groups:

(1) Any blood relative, including those of half-blood, and including first cousins, nephews, or nieces, and persons of preceding generations as denoted by prefixes of grand, great, or great-great.

(2) Stepfather, stepmother, stepbrother, and stepsister.

(3) Persons who legally adopt a child or his parent as well as the natural and other legally adopted children of such persons, and other relatives of the adoptive parents in accordance with State law.

(4) Spouses of any persons named in the above groups even after the marriage is terminated by death or divorce.

(B) A home is the family setting maintained or in process of being established, as evidenced by assumption and continuance of responsibility for day to day care of the child by a relative with whom the child is living. A home exists so long as the relative exercises responsibility for the care and control of the child, even though either the child or the relative is temporarily absent from the customary family setting. Within this interpretion, the child is considered to be "living with" his relative even though

(1) He is under the jurisdiction of the court (e.g., receiving probation services or protective supervision); or

(2) Legal custody is held by an agency that does not have physical possession of the child.

APPENDIX B

APPENDIX B

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 76-1884

MARCEL YOUAKIM and LINDA YOUAKIM, individually and as foster parents, TIMOTHY ROBERTSON, a minor, by his sister and next friend LINDA YOUAKIM, MARY LOU ROBERTSON, a minor, by her sister and next friend LINDA YOUAKIM, LARRY ROBERTSON, a minor, by his sister and next friend LINDA YOUAKIM, and SHERRY ROBERTSON, a minor, by her sister and next friend LINDA YOUAKIM, and all others similarly situated,

Plaintiffs-Appellees,

v.

JEROME MILLER, individually and as Director of THE DEPARTMENT OF CHILDREN AND FAMILY SERVICES and THE DEPARTMENT OF CHILDREN AND FAMILY SERVICES of the STATE OF ILLINOIS,

Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 73 C 635—**Alfred Y. Kirkland,** *Judge.*

ARGUED APRIL 13, 1977—
DECIDED SEPTEMBER 27, 1977

Before CUMMINGS and PELL, *Circuit Judges,* and CAMPBELL, *Senior District Judge.**

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* Senior District Judge William J. Campbell of the Northern District of Illinois is sitting by designation.

PELL, *Circuit Judge.* Appellants Jerome Miller and the Department of Children and Family Services (hereinafter referred to collectively as the DCFS) seek reversal of orders of the district court entered on July 27, 1976, and August 24, 1976, determining that related persons caring for children who have been declared wards of the state are eligible for AFDC-FC assistance under § 408 of the Social Security Act, 42 U.S.C. § 608.[1]

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1. 42 U.S.C. § 608 (1970 ed. and Supp. V, 1975), provides:

Effective for the period beginning May 1, 1961—

(a) the term "dependent child" shall, notwithstanding section 606(a) of this title, also include a child (1) who would meet the requirements of such section 606(a) or of section 607 of this title except for his removal after April 30, 1961, from the home of a relative (specified in such section 606(a)) as a result of a judicial determination to the effect that continuation therein would be contrary to the welfare of such child, (2) whose placement and care are the responsibility of (A) the State or local agency administering the State plan approved under section 602 of this title, or (B) any other public agency with whom the State agency administering or supervising the administration of such State plan has made an agreement which is still in effect and which includes provision for assuring development of a plan, satisfactory to such State agency, for such child as provided in paragraph (f)(1) and such other provisions as may be necessary to assure accomplishment of the objectives of the State plan approved under section 602 of this title, (3) who has been placed in a foster family home or child-care institution as a result of such determination, and (4) who (A) received aid under such

(Footnote continued on following page)

1. *continued*

State plan in or for the month in which court proceedings leading to such determination were initiated, or (B)(i) would have received such aid in or for such month if application had been made therefor, or (ii) in the case of a child who had been living with a relative specified in section 606(a) of this title within 6 months prior to the month in which such proceedings were initiated, would have received such aid in or for such month if in such month he had been living with (and removed from the home of) such a relative and application had been made therefor;

(b) the term "aid to families with dependent children" shall, notwithstanding section 606(b) of this title, include also foster care in behalf of a child described in paragraph (a) of this section—

(1) in the foster family home of any individual, whether the payment therefor is made to such individual or to a public or nonprofit child-placement or child-care agency, or

(2) in a child-care institution, whether the payment therefor is made to such institution or to a public or nonprofit private child-placement or child-care agency, but subject to limitations prescribed by the Secretary with a view to including as "aid to families with dependent children" in the case of such foster care in such institutions only those items which are included in such term in the case of foster care in the foster family home of an individual.

(c) the number of individuals counted under clause (A) of section 603(a)(1) of this title for any month shall include individuals (not otherwise included under such clause) with respect to whom expenditures were made in such month as aid to families with dependent children in the form of foster care; and

(d) services described in paragraph (f)(2) of this section shall be considered as part of the administration of the State plan for purposes of section 603

(Footnote continued on following page)

1. *continued*

(a)(3) of this title;

but only with respect to a State whose State plan approved under section 602 of this title—

(e) includes aid for any child described in paragraph (a) of this section, and

(f) includes provision for (1) development of a plan for each such child (including periodic review of the necessity for the child's being in a foster family home or child-care institution) to assure that he receives proper care and that services are provided which are designed to improve the conditions in the home from which he was removed or to otherwise make possible his being placed in the home of a relative specified in section 606(a) of this title, and (2) use by the State or local agency administering the State plan, to the maximum extent practicable, in placing such a child in a foster family home or child-care institution, of the services of employees, of the State public-welfare agency referred to in section 722(a) of this title (relating to allotments to States for child welfare services under sections 721 to 726 of this title) or of any local agency participating in the administration of the plan referred to in such section, who perform functions in the administration of such plan.

For purposes of this section, the term "foster family home" means a foster family home for children which is licensed by the State in which it is situated or has been approved by the agency of such State responsible for licensing homes of this type, as meeting the standards established for such licensing; and the term "child-care institution" means a nonprofit private child-care institution which is licensed by the State in which it is situated or has been approved, by the agency of such State responsible for licensing or approval of institutions of this type, as meeting the standards established for such licensing.

The essential and dispositive question concerns the meaning, for federal welfare purposes, of the term "foster family home."

The basic facts regarding the DCFS denial of foster care payments to the Youakims have been recounted in the three-judge district court opinion in *Youakim* v. *Miller*, 374 F. Supp. 1204 (N.D. Ill. 1974), *vacated*, 425 U.S. 231 (1976) (per curiam). Initially, the named plaintiffs filed a civil rights class action against the DCFS charging that the Illinois statutory foster care scheme denied them equal protection under the Fourteenth Amendment. After this claim was rejected by the three-judge court, *see* 374 F. Supp. at 1207-10, the plaintiffs pressed in argument before the Supreme Court the claim that the Illinois state law was in conflict with the Social Security Act. The Supreme Court determined that it was appropriate that the plaintiffs be permitted to press the issue of conflict between state and federal law in the district court, vacated the judgment, and remanded for proceedings consistent with its opinion. 425 U.S. at 236-37.

On remand, the district court reviewed both the history of the case and the contentions of the parties. The opinion of the district court is, with certain exceptions,[2] adopted as the opinion of this court and, the order not having been published, a copy thereof is attached to this opinion as an Appendix. Our independent comments are directed

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2. We also note the district court's references to Sections 601, 603, 606, and 608 of the Social Security Act must be read as referring to the appropriate section numbers of Title 42, United States Code, and not to the Sections of the Act as adopted.

to arguments of the parties which are not set forth or analyzed in the court's memorandum opinion of July 27, 1976 or which arise by virtue of the formulation of the judgment order of August 24, 1976.

I

The district court agreed, as do we, with the Youakims' argument that the plain meaning of the federal statute is that *all* state wards placed in approved foster homes are eligible for full AFDC-FC payments under 42 U.S.C. § 608. The district court further concluded the HEW's Program Instruction APA-PI-75-9, issued on October 25, 1974, was consistent with the plain words and meaning of Section 408 of the Act, 42 U.S.C. § 608. We agree. Finally, the district court concluded after study of the legislative history that Congress did not intend to exclude related foster homes from AFDC-FC benefits authorized in Section 408 of the Act but rather intended such benefits to be paid to eligible children in *all* approved foster homes. We agree that eligible children in approved foster homes are entitled to benefits, but we rest our conclusion on the meaning of the statute itself rather than upon a determination of an implied legislative intent.

The DCFS has consistently maintained that Congress did not intend to benefit children who are *related* to their caretakers as *foster* children living with *foster parents* under the AFDC *foster care* provisions contained in 42 U.S.C. § 608. The essential basis of the DCFS refusal to pay the foster care benefit rate to the Youakims has been its view, succinctly stated before this court, that " a foster family home has to mean a non-related home." One of the strongest arguments in support of the DCFS position is found in a dictionary definition of the adjective "foster." In WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY the general definition is "affording, receiving, or sharing nourishment, upbringing, or parental care though not related by blood or legal ties."[3] The DCFS position is weakened, however, by the examples following the general definition:

a: rearing the child of another

b: brought up by someone other than one's natural parent

c: reared in the same family but not of the same parentage.

Clearly the plaintiffs here are rearing the child of another (a *supra*) and the children involved are being brought up by someone other than their natural parents (b *supra*). In any event, as the DCFS concedes "Congress did not mean to incorporate Webster by reference."

Although the DCFS steadfastly adheres to its contention that the term "related foster parent" is a misnomer for federal welfare purposes, it has admitted that the language of the Social Security Act does not itself exclude relatives from the status of foster parentage.[4] The DCFS

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3. As is the case not infrequently in the English language ambiguities easily emerge. Thus, it might be argued that when persons are designated by a court order to rear a child of someone else, they could not be foster parents because they are related by legal ties. We will assume, however, for the purposes of consideration of the definition quoted above that "related" might narrow the construction to adoptive non-blood parents.

4. At oral argument, the DCFS stated that "[i]t's very true that under the [federal] foster care program the relatives' home is not excluded from coverage under this program—It's not literally excluded." On January 25, 1974, during oral argument before the three-judge

has constructed an elaborate, indeed ingenious argument, regarding an implied legislative intent to exclude relatives from the denotation of the word "foster." However, the DCFS has not directed equal attention to the possibility that our standard of judgment should be the meaning of the statute itself. *See* 2A SUTHERLAND STATUTORY CONSTRUCTION § 45.07, at 20 (1973 ed.)

Our judicial function is limited to applying statutes on the basis of what Congress has written, not what Congress might have written. *See Territory of Guam* v. *Olsen*, —— U.S. ——, —— 45 U.S.L.W. 4469, 4472 (May 23, 1977) (Marshall, J., dissenting). Examination of the various subsections of the Social Security Act discloses that Congress never really attempted to formulate comprehensive definitions of all the terms it employed in the statute. Thus, 42 U.S.C. § 606(b)(2)(D) refers to "aid in the form of foster home care" but does not itself explicate the meaning of the phrase. Similarly, 42 U.S.C. § 608 (b) refers to "foster care in behalf of a child" but again does not explicate the meaning of that phrase.

However, Congress did use the expression "foster family home of any individual," 42 U.S.C. § 608(b)(1). The Youakims read the last three words of the statutory expression as supporting their view, while the DCFS argues that the entire expression must be read in order to

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court, the DCFS similarly admitted that "[t]here is nothing in Federal or State statutes which bars payment to foster parents of related children, that plaintiffs have repeatedly stressed." Of course, these concessions were made in the light of the DCFS reading of an *implied* legislative intent to bar payments under the 42 U.S.C. § 608 program to individuals qualifying under 42 U.S.C. § 606.

discern its real meaning. Forthrightly, the DCFS states that "[t]he question then becomes, what does it mean when Congress has said 'foster family home'?" We agree that this is the appropriate question, but we think that Congress has itself provided the answer by defining that term.

Although Congress has not defined "foster home care," *see* 42 U.S.C. § 606(b)(2)(D), or "foster care," *see* 42 U.S.C. § 608(b), it has in fact set forth a statutory definition of the expression "foster family home":

> For purposes of this section, the term "foster family home" means a foster family home for children which is licensed by the State in which it is situated or has been approved, by the agency of such State responsible for licensing homes of this type, as meeting the standards established for such licensing . . . .

The DCFS submits that this definition is "certainly circular." We need not determine whether or not this geometric criticism is valid, for the statutory phrasing does not appear to be framed with unremitting attention to the demands of lexical science. Our disposition of the appeal should not rest upon the lexicographical expertise of the draftsmen but upon the application of the statute to the facts of the case.

Thus, if the Youakims' home has been approved by the DCFS as meeting the standards established for the licensing of foster care homes, it falls within the statutory definition. The DCFS implicitly concedes that fact in its argument attacking the district court's supposedly erroneous findings.[5] The DCFS argues that the Youakims'

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5. Thus, the DCFS argues that "[t]he conclusion of the district court that the Youakims are foster parents essentially evolve[s] from the court's erroneous findings

(footnote continued on next page)

home *obviously* could not have been approved as a foster care home. The logic of this argument is difficult to discern in view of the formulation of the Relative Home Placement Agreement.

The first sentence of that agreement states that:

> The Division of Child Welfare, Department of Children and Family Services, has approved the home of Mr. and Mrs. Marcel Youakim, address 1720 Mannheim Road, Des Plaines, Ill. for the care of a foster child: Name Timothy Robertson Born 5/1/65.

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that the Youakim home 'has been approved as a foster care home by the State . . . .' " In pressing still further this contention, the DCFS insists that:

> By statute, the State of Illinois *licenses* foster family homes and child-care institutions, in contrast to the equivalent "approval" procedure designated in § 608 which is followed in states which do not license foster care homes. (See Ill. Rev. Stat., 1971, Ch. 3, § 2214.) The Youakim home was not licensed by the State of Illinois, and *obviously it could not have been "approved" as a foster care home.* While it is true that because all children declared to be state wards are the legal responsibility of the state, the Youakim home was initially inspected by state officials to determine that such home was suitable for the placement of the related children, at no time was the home *officially designated as a foster care facility* within the meaning of § 608. Hence, the district court's statement that the Youakim home "has been approved as a foster care home" is erroneous. [Emphasis supplied.]

The last sentence of the agreement states that:

> This placement agreement, made in good faith and mutual confidence, is equally binding on the Department and the ABOVE NAMED RELATIVES.

The plain language of the agreement thus states that the Youakims' home has been approved for the care of a foster child. Under Fed. R. Civ. P. 52(a), findings of fact and conclusions of law are unnecessary on decisions of motions under Fed. R. Civ. P. 56. Because the placement agreement directly refers to the care of a foster child, we agree with the district court's *determination* that the Youakims' home has been approved as a *foster care home.* Whether it is a "foster family home" requires construction of the federal statute.

However, the DCFS argues that there is no showing anywhere in the record that the Youakims have actually met the standards required for the licensing of foster homes, so as to have incurred the identical obligations of all other foster parents in Illinois. In view of the DCFS assertion that this case should be decided on the basis of the clear and literal language which Congress used in enacting 42 U.S.C. §§ 606 and 608, we decline to find merit in the present argument.

We note that 42 U.S.C. § 608 does not require that an approved home actually meet the standards for licensed foster homes. Instead, the statutory language states that the home must be approved by the state agency as meeting the standards for licensing. The suggestion that the Youakims obviously could not be approved, *see* note 5 *supra,* is juxtaposed with the assertion that Illinois is a licensing state. However, the DCFS has already admitted

in this case that the Youakims could not obtain a license.[6] Moreover, the DCFS Family Services Family Placement Manual states not only that "related" persons are not subject to foster home licensing but also that a relative home must reasonably meet minimum standards if it is to be considered as a placement resource.

We do not understand the DCFS to be contending that its staff workers ignored the criteria established in the Placement Manual. That the home of the Youakims was not "officially designated as a foster care facility," *see* note 5 *supra*, stems entirely from the want of power under Illinois law to make such an official designation. The very statutory provision struck down in the lower court's judgment order defines a "foster family home" as a facility for child care in the residences of families who receive children *unrelated* to them. Ill. Rev. Stat. 1975, ch. 23, § 2212.17. The DCFS can hardly rely upon a definition of "foster family home" which directly conflicts with the federal statutory definition as a way of upsetting the district court's determination of a violation of the Supremacy Clause. Nor can the DCFS procedure of

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6. At oral argument before the three-judge court, the DCFS explained that relatives were not subject to the licensing requirement. "[T]he State in its wisdom regards foster care on the part of relatives to be of a much more personal nature [than is the case with persons unrelated to the children for whom they provide foster parent care], and in its desire to secure family unity excludes relatives from the requirements of obtaining a license before placement is made with them."

striking out the word "foster" wherever it appears in a Foster Home Placement Agreement be determinative of the Youakims' right to foster care benefits.[7]

The DCFS argues that the formulation of § 608(f), *see* note 1 *supra*, makes no sense whatsoever if related persons like the Youakims are held to be eligible for foster care payments. The DCFS contends that the only reasonable conclusion to be drawn from the Congressional insistence that the state plan should be designed to make possible the placement of the child in the home of a relative specified in § 606(a) is that Congress could not have intended to extend foster care coverage to a group of persons (*viz.*, relatives caring for needy children) who were already covered by § 606 or to needy dependent children who are living with relatives. The DCFS interprets § 608(f) as meaning that, rather than regarding the Youakim home as a permanent stable environment for the Youakims' related children, it would paradoxically be required under the subsection to strive to remove the children from such temporary foster care and place them elsewhere.

We think that the DCFS reading of 42 U.S.C. § 608(f) is incorrect. That particular provision appears in a long, convoluted passage which begins with subsection (c) and continues up to the defining passage. *See* note 1 *supra*. Only three readings of the subsection are plausible.

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7. As the text of the executed agreement itself makes clear, the DCFS attempt to strike out "foster" in all instances was not successfully executed. Because the DCFS approved the home for the care of a foster child, it ill serves their case to argue now that the Youakims have persistently begged the essential question in this appeal by insisting that they are foster parents.

First, the passage may refer back to subsection (c). In that case, it sets forth a condition which must be met before individuals receiving foster care expenditures are to be counted under § 603(a)(1)(A).[8] That referenced

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8. 42 U.S.C. § 603(a)(1)(A) (1970 ed. and Supp. V, 1975), provides:

> (a) From the sums appropriated therefor, the Secretary of the Treasury shall pay to each State which has an approved plan for aid and services to needy families with children, for each quarter, beginning with the quarter commencing October 1, 1958—
>
> (1) in the case of any State other than Puerto Rico, the Virgin Islands, and Guam, an amount equal to the sum of the following proportions of the total amounts expended during such quarter as aid to families with dependent children under the State plan (including expenditures for premiums under part B of subchapter XVIII of this chapter for individuals who are recipients of money payments under such plan and other insurance premiums for medical or any other type of remedial care or the cost thereof)—
>
> (A) five-sixths of such expenditures, not counting so much of any expenditure with respect to any month as exceeds the product of $18 multiplied by the total number of recipients of aid to families with dependent children for such month (which total number, for purposes of this subsection, means (i) the number of individuals with respect to whom such aid in the form of money payments is paid for such month, plus (ii) the number of other individuals with respect to whom expenditures were made in such month as aid to families with dependent children in the form of medical or any other type of remedial care, plus (iii) the number of individuals, not counted under clause (i) or (ii), with respect to whom payments

subsection specifies in part the amount which the Secretary of the Treasury shall pay in the case of a State by authorizing five-sixths of certain expenditures, not counting for purposes of *that subsection* a certain number of individuals. Second, the provision may refer back to subsection (d). In that case, the provision has significance for purposes of the reimbursement of administrative expenditures as provided in § 603(a)(3).[9] Either reading of subsection (f) respects the syntactic construction of the statute and gives some meaning to the Congressional usage of punctuation.

Third, by attaching greater significance to legislative margination than to punctuation or syntax, § 608(f) may be read as qualifying the legislative determination to make foster care benefits available to needy dependent

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9. 42 U.S.C. § 603(a)(3) (1970 ed. and Supp. V, 1975), in pertinent part, provides:

> (a) From the sums appropriated therefor, the Secretary of the Treasury shall pay to each State which has an approved plan for aid and services to needy families with children, for each quarter, beginning with the quarter commencing October 1, 1958—
>
> (3) in the case of any State, an amount equal to the sum of the following proportions of the total amounts expended during such quarter as found necessary by the Secretary of Health, Education, and Welfare for the proper and efficient administration of the State plan—

> described in section 606(b)(2) of this title are made in such month and included as expenditures for purposes of this paragraph or paragraph (2)); plus . . . .

children. In that case, the provisions of the foster care program embodied in subsections (a) to (d) are effective only under certain conditions. The "but only" clause of the section which immediately precedes subsections (e) and (f) thus encompasses all of the preceding statutory material. Assuming but without deciding that such is the case, subsection (f) still cannot be tortured into meaning that a state is required to remove children from the care of approved related persons. The very terms of the subsection merely provide that the agency plan for children assure that services are provided which are designed to improve the conditions of the home from which they were removed or to otherwise make it possible to place them in the home of a specified relative. *See* note 1 *supra*. A plan for any child which promoted the former objective would suffice. Thus, as the DCFS has earlier conceded, there is nothing in the language of § 608(f) which prevents payment of foster care benefits to related foster parents.

Moreover, were this court to attach greater significance to margination than to punctuation, it would inexorably be drawn back again to the defining passage. That portion of the statutory section is marginated in such a fashion as to place it on an equal footing with the effectuating clause and the "but only" qualification. Because the defining passage controls the entire section, not merely discrete subsections thereof, its plain language must control.

We conclude that neither the DCFS reliance on the ordinary meaning of the word "foster" nor its interpretation of the planning requirements embodied in § 608(f) can justify deviation from the statutory definition of a "foster family home." Thus we rule that the district court's grant of summary judgment on July 27, 1976 in favor of the Youakims was legally correct.

II

The DCFS submits that this court should reverse the judgment order of August 24, 1976, even if it concludes that the summary judgment order was proper. The DCFS contends that the implementing order is overly broad, misleading, and contrary to the Social Security Act itself. In particular, the DCFS notes that the lower court ignored the § 608(a)(4) requirement that the foster child must either have been receiving AFDC or have been eligible to receive AFDC assistance had application been made within six months prior to the initiation of court action leading to a determination of wardship. *See* note 1 *supra*. The Youakims concede the possibility of ambiguity in the judgment order, but indicate that the foster children have no objection to an amendment to the order which would include reference to the 42 U.S.C. § 608(a)(4) requirement of an AFDC eligible home.

We agree that the judgment order, if read in its entirety, correctly and properly indicates the required scope of relief. However, in order to remove any possible misinterpretation that the § 608(a)(4) requirement need not be met in order to qualify for AFDC-FC benefits, we modify Paragraph 2 of the August 24, 1976, order.[10]

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10. The paragraph as modified will thus read:

2. 42 U.S.C. §§ 601 and 608 require that whenever a child has been or is removed from the home of a relative specified in 42 U.S.C. § 606(a) as the result of a judicial determination to the effect that continuation therein would be contrary to the welfare of such child and his placement and care are the responsibility of defendants, and such child is placed by defendants in an approved foster home maintained by relatives of

The DCFS further argues that the portion of the judgment order requiring it to promulgate new rules and regulations consistent with the court's order is an unwarranted intrusion into the internal affairs of the state and beyond the jurisdiction of the court.

We are satisfied that the district court had equitable power to order the promulgation of new rules and regulations. Although this case differs somewhat from *Mandley* v. *Trainor*, 545 F. 2d 1062 (7th Cir. 1976) (*Mandley II*), *cert. granted sub nom. Quern* v. *Mandley*, —— U.S. ——, 45 U.S.L.W. 3790 (June 6, 1977), the dissimilarity is not sufficient to require modification of the district court's order.

In *Mandley II*, *supra* at 1072, we recognized that the Secretary of HEW had a mandatory duty under 42 U.S.C. § 1302 to promulgate regulations implementing the provisions of the Social Security Act. In that case,

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the child, and such child received aid under the State plan approved under section 602 of Title 42 in or for the month in which court proceedings leading to such determination were initiated or would have received such aid in or for such month if application had been made therefor or, in the case of a child who had been living with a relative specified in § 606(a) within six months prior to the month in which such proceedings were initiated would have received such aid in or for such month if in such month he had been living with (and removed from the home of) such a relative and application had been made therefor, such child and those relatives shall be eligible for full AFDC-FC payments and ancillary benefits to the same extent as a child placed in a foster home maintained by foster parents not related to the child, and such parents.

we did decline to "order HEW specifically to include any items in its new regulation." *Id.* at 1073. Nonetheless, we rejected the notion implicit in HEW's objection that ordering the promulgation of regulations was an untoward invasion of the province of the Secretary. *Id.* at 1072. Here also, the DCFS is mandated by state law to establish rules and regulations concerning its operation of programs for foster care. *See* Ill. Rev. Stat. 1975, ch. 23, § 5005.[11] Moreover, the district court's order in this case, by its very terms, does not direct the DCFS to adopt any particular rule or regulation. Instead, Paragraph 7 of the order carefully uses such words as "policies and procedures." It requires modification of existing provisions only insofar as

> existing policies and procedures presently exclude from eligibility or deny full AFDC-F[C] foster care payments and ancillary benefits to otherwise eligible foster children and foster parents related to them, because such foster children are living in foster homes maintained by such foster parents, and/or which are otherwise inconsistent with or frustrate the statutory policy of Title IV of the Social Security Act, 42 U.S.C. § 601 *et seq.*, favoring placement of such foster children in the homes of relatives.

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11. The DCFS contends that, under Ill. Rev. Stat. 1975, ch. 23, § 5004, the Department has been given discretionary authority to promulgate rules and regulations consistent with law. We regard as disingenuous the DCFS omission of the plain language in § 5005 which *mandates* the establishment of rules and regulations.

Thus, there is no requirement that specific items be included in a promulgated regulation. The only proper reading of the judgment order is that it requires the DCFS to formulate its regulations consistent with the demands of federal statutory law. Acceptance of the DCFS argument would strip the federal courts of jurisdiction and power to enforce rights under 42 U.S.C. § 1983. The DCFS reliance on *Rizzo* v. *Goode*, 423 U.S. 362 (1976), is misplaced. Although the federal courts must be constantly mindful of the adjustment to be preserved between federal equitable power and State administration of its own law, they must, and do, retain power to enforce compliance with federal statutes.

For the reasons hereinbefore stated, the orders appealed from are affirmed as modified.

AFFIRMED.

APPENDIX

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 73 C 635

MARCEL YOUAKIM and LINDA YOUAKIM individually and as foster parents, TIMOTHY ROBERTSON, a minor, by his sister and next friend LINDA YOUAKIM, MARY LOU ROBERTSON, a minor, by her sister and next friend LINDA YOUAKIM, LARRY ROBERTSON, a minor, by his sister and next friend LINDA YOUAKIM, and SHERRY ROBERTSON, a minor, by her sister and next friend LINDA YOUAKIM, and all others similarly situated,

Plaintiffs,

v.

JEROME MILLER individually and as Director of the DEPARTMENT OF CHILDREN AND FAMILY SERVICES, and the DEPARTMENT OF CHILDREN AND FAMILY SERVICES of the STATE OF ILLINOIS,

Defendants.

MEMORANDUM OPINION AND ORDER

This matter comes before the Court on remand from the United States Supreme Court for consideration of plaintiffs' claim that the statutory scheme of the Illinois foster care program, specifically Illinois Revised Statutes ch. 23, §§ 2212.05, 2212.17, and 5005, is in conflict with Title IV of the Social Security Act, 42 U.S.C. §§ 601 *et seq.*

This suit was commenced as a class action to enjoin the operation of the Illinois foster care payment scheme. Because the plaintiffs sought to enjoin the operation of a scheme established by state statute, a three-judge court was convened pursuant to 28 U.S.C. §§ 2281, 2284. Under the Illinois scheme foster parents who provide homes for *unrelated* children receive monthly foster care payments (AFDC-FC) of $105.00 per child from the Department of Children and Family Services, while foster parents who provide homes for *related* children do not receive such payments. Related foster parents, instead, are eligible for smaller AFDC payments from the Illinois Department of Public Aid.

The three-judge court granted summary judgment in favor of defendants, finding that the Illinois scheme "does not deny plaintiffs the equal protection of the laws." 374 F. Supp. 1204, 1210 (N.D. Ill. 1974). The Supreme Court, in vacating the three-judge court judgment and remanding, noted that "the circumstances justify . . . our dealing with the issue of conflict between state and federal statute at least to the extent of vacating the judgment below and remanding the case for consideration of the claim that the Illinois foster care program is in conflict with the Social Security Act." *Youakim* v. *Miller*, —— U.S. ——, 96 S. Ct. 1399, 1401 (1976).

STATEMENT OF FACTS

Plaintiffs are Marcel and Linda Youakim, husband and wife, and Linda's four minor brothers and sisters. All four minors were adjudged wards of the State in 1969. Two of the children have been living with their related foster parents, the Youakims since 1972; the other two children have been living in two separate unrelated foster care facilities since 1969. Because plaintiff Linda Youakim is related to her two foster children, the Youakims are ineligible for foster care payments (AFDC-FC) under the Illinois Child Care Act. Illinois Revised Statutes ch. 23, 2212.17.[1] The Youakims did apply for and are receiving the smaller AFDC payments for both children. Illinois Revised Statutes ch. 23, §§ 4-1 *et seq.*[2]

Plaintiffs allege injury resulting in the financial inability to provide adequate care for their foster children and to bring the remaining two children into their foster home. Plaintiffs argue that the Illinois scheme violates the Supremacy Clause of the United States Constitution. The Youakims also contend that the Illinois scheme denies related foster families equal protection of the laws

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1. This section provides in pertinent part: "Foster family home" means a facility for child care in residences of families who receive no more than [eight] children *unrelated* to them . . . for the purpose of providing family care and training for the children on a full-time basis. (emphasis added)

2. Although foster parents caring for related children are eligible for Aid to Families with Dependent Children ("AFDC") payments under the statute, they must make a separate application to the Department of Public Aid for the average $63.00 per month per child.

by discriminating against wards of the State and their relatives who are financially unable to provide foster homes for the wards without full foster care payments.

On remand from the Supreme Court, plaintiffs ask this Court to enjoin enforcement of the State statutes involved pursuant to Rule 65(a), Federal Rules of Civil Procedure, or in the alternative, to grant summary judgment against defendants pursuant to Rule 56, Federal Rules of Civil Procedure. Defendants ask that this Court deny plaintiffs' motion for a preliminary injunction and grant summary judgment in their favor.

THE PARTIES' ARGUMENTS

Plaintiffs contend that Illinois attempts to add an additional eligibility requirement to the federal scheme regulating AFDC-FC foster care payments. In support of their position, plaintiffs note that in the Social Security Act (the "Act"), Section 601 [Section 401 of the Social Security Act] evidences a clear national policy favoring placement of dependent children in their own homes or the homes of certain close relatives,[3] while Section 608 [408] provides that federal funds are to be paid for the foster care of dependent children in the home of *any* individual. Section 608 [408] defines the foster family home of any individual as:

> [A] foster family home for children which is licensed by the state in which it is situated or has been approved, by the agency of such state responsible for licensing homes of this type as meeting the standards established for such licensing . . . .

Plaintiffs allege that in contrast to the federal scheme, the Illinois scheme requiring that foster parents be unrelated pulls families apart by prohibiting receipt of AFDC-FC payments by related foster parents. Section 5 of the Department of Children and Family Services Act, Illinois Revised Statutes ch. 23, § 5005, empowers the Department and its Director to establish rules and regulations concerning foster care, while the other challenged sections provide in pertinent part:

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3. Linda Youakim, as sister of the minor plaintiffs, is such a close relative under § 606(a)(1) [§ 406(a)(1)] of the Act.

> "Facility for child care" or "child care facility" means any person . . . who or which receives or arranges for care or placement of one or more children *unrelated* to the operator of the facility. Illinois Revised Statutes ch. 23, §§ 2212.05, 2212.17. (emphasis added)

The plaintiffs note further that while Illinois Revised Statutes ch. 23, § 4-1.2 provides for foster care payment, the *Illinois Department of Children and Family Services Placement Manual* states that "[t]he Department has no statutory authority to pay relatives for the care of children." *Manual* at 97.

Defendants argue, conversely, that the Illinois foster care program parallels the federal scheme since parents and close relatives are treated separately from foster parents. Defendants note that Sections 601-606 [401-406] of the Act provide for aid to needy children living with their parents or certain close relatives (AFDC), while Section 608 [408] provides aid to children removed by court order from the homes of parents or close relatives and placed in foster care facilities (AFDC-FC). They argue Illinois, likewise, provides aid for children living with their parents or close relatives under the AFDC program, Illinois Revised Statutes ch. 23, §§ 4-1 to 4-11, and aid to children living with unrelated foster parents under the AFDC-FC program, Illinois Revised Statutes, ch. 23, § 4-1.2. Defendants note that Section 603(a)(1)(B) [403(a)(1)(B)] of the Act, as construed by the court in *Ramos* v. *Montgomery,* 313 F. Supp. 1179 (S.D. Cal. 1970), *aff'd,* 400 U.S. 1003 (1971), authorizes higher payments to recipients of AFDC-FC benefits than to AFDC recipients. Finally, defendants argue that the two categories, parents and relatives of needy children and foster

parents, are mutually exclusive under a correct interpretation of the Department of Health, Education and Welfare ("HEW") regulations contained in 45 C.F.R. § 233.90 (1975).

CONCLUSIONS

The Constitution and the laws of the United States are the supreme law of the land. *McCulloch* v. *Maryland,* 17 U.S. (4 Wheat.) 316 (1819). Because of the Supremacy Clause of the United States Constitution, Article VI, Clause 2, states may not enact laws or regulations which are contrary to federal law. If the challenged Illinois statutes are in conflict with Article IV of the Social Security Act, such statutes are invalid under the Supremacy Clause. *King* v. *Smith,* 392 U.S. 309 (1968); *Lewis* v. *Martin,* 397 U.S. 552 (1970); *Townsend* v. *Swank,* 404 U.S. 282 (1971); *Carleson* v. *Remillard,* 406 U.S. 598 (1972); *Van Lare* v. *Hurley,* 421 U.S. 338 (1975); and *Philbrook* v. *Glodgett,* 421 U.S. 707 (1975.)

As the basic question is one of statutory construction, this Court looks to three sources to determine whether the Illinois scheme violates the provisions of Title IV of the Act: (1) the plain words and meaning of the Act; (2) the interpretation and advice of the administering agency, HEW; and (3) the legislative history and the overall purpose of the Act.

1. PLAIN MEANING OF THE SOCIAL SECURITY ACT

Plaintiffs argue that the plain meaning of the Act is that all wards of the state placed in approved foster homes are eligible for full AFDC-FC payments under Section 608 [408]. In contrast, defendants contend that

the plain meaning of the Act indicates that Congress intended to provide assistance to needy children living with close relatives through the AFDC program under Section 606 [406] of the Act rather than through the Section 608 [408] foster care program. This Court agrees with plaintiffs[']contention.

The four minor plaintiffs were removed from their own home and declared wards of the State in 1969. While all four lived in unrelated foster care facilities, those facilities received the full $105.00 per child per month AFDC-FC allotment. In order to effectuate the policy that wards of the State be placed in the best home possible, two of the four children were moved to a related home in 1972 and AFDC-FC payments on behalf of those children were terminated.

Plaintiffs Youakims' home has been approved as a foster care home by the State as required by Section 608 [408] of the Act.[4] The Youakims were required to sign the same Illinois Foster Home Placement Agreement[5] and incurred identical obligations as all other foster parents in Illinois.

This Court finds, therefore, that under the plain words and meaning of Section 608 [408] of the Act, the four minor plaintiffs meet all the requirements for eligibility and the Youakims are an approved foster home.

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4. Illinois *licenses* unrelated foster homes and *approves* homes of related individuals taking in wards of the State. Approved homes, however, must meet the same high standards as licensed homes and must submit to regular inspections and reports by employees of the Department of Children and Family Services.

5. In the Youakims' Agreement, however, the word *foster* and the sections providing for AFDC-FC payments were deleted.

2. ADVICE OF THE ADMINISTERING AGENCY

The Supreme Court, in remanding this case, noted that "[t]he interpretation of a statute by an agency charged with its enforcement is a substantial factor to be considered in construing the statute." (citations omitted) The plaintiffs note that the Solicitor General of the United States, arguing on behalf of HEW in an amicus memorandum filed with the Supreme Court, submitted:

> [T]hat the Illinois policy of denying foster care AFDC [AFDC-FC] benefits for children living with relatives is invalid because it conflicts with specific criteria for eligibility set forth in the Social Security Act . . . .
> Those conditions were satisfied here, and the [children are] therefore entitled to foster care benefits. (Amicus Memorandum at 2, 5)

Plaintiffs further submit that HEW has issued a "Program Instruction"[6] to *all* state welfare agencies which requires full AFDC-FC payments to children living in approved related foster homes.

Defendants urge this Court to reject these new HEW guidelines as inconsistent with the federal statute. However, this Court finds the guidelines to be consistent with the plain words and meaning of Section 608 [408] of the Act.

This Court believes these guidelines are persuasive authority in support of plaintiffs' position.

3. LEGISLATIVE HISTORY OF THE SOCIAL SECURITY ACT

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6. Program instruction APA-PI-75-9 was issued on October 25, 1974. The Supreme Court considered the issuance of this directive as one reason for vacating the lower court's judgment and remanding this case.

The legislative history of Title IV of the Act indicates that its overall purpose is to insure the best possible care for all dependent children. Originally Title IV only covered needy children living with parents or designated relatives, and Title V covered foster children. In 1961 aid to foster children was brought under Title IV when Congress created AFDC-FC assistance. In authorizing the new foster care program, Congress noted that states would have the option of dispersing federal funds to children who had been adjudicated wards of the state and who were in need of foster homes.[7]

Plaintiffs contend that the complete legislative history of the Act supports the position that Congress intended every eligible child placed in an approved foster home to receive AFDC-FC benefits. Defendants respond that the legislative history shows Congress intended a continuing distinction between foster care and related care despite the fact that both programs were brought under one title in 1961.

After studying the relevant legislative history this Court believes Congress did not intend to exclude related foster homes from AFDC-FC benefits authorized in Section 608 [408] of the Act. Rather, Congress intended such benefits to be paid to eligible children in *all* approved foster homes.

This Court concludes therefore that Title IV of the Social Security Act authorizes AFDC-FC payments to all eligible children living in state-approved foster homes. The only requirements set forth in Section 608 of the Act are that such children be: (1) adjudicated wards of the

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7. *See* Sen. Rep. No. 168, 87th Cong. 1st Sess., 1961 U.S. Cong. & Adm. News V.2 at 1717.

state; (2) removed from their own homes; and (3) in need of assistance. Illinois, by refusing AFDC-FC payments to all related foster parents, attempts to add a further requirement of eligibility for such payments. The Illinois scheme, Illinois Revised Statutes ch. 23, §§ 2212.05, 2212.17 and 5005, insofar as it denies eligibility to foster parents providing homes for children related to them, violates Title IV of the Social Security Act, §§ 601, 608 [§§ 401, 408] and the Supremacy Clause of the United States Constitution, Article VI, Clause 2. The challenged statutes therefore must fall. *King* v. *Smith, supra; Townsend* v. *Swank, supra; Carleson* v. *Remillard, supra; Van Lare* v. *Hurley, supra;* and *Philbrook* v. *Glodgett, supra.*

Accordingly, plaintiffs' motion for summary judgment is granted. Since plaintiffs have prevailed on the statutory issue, it is unnecessary for this Court to reach the equal protection issue.

ENTER: /s/ ALFRED Y. KIRKLAND, *Judge*

DATED: July 27, 1976

A true Copy:

Teste:

.....

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX C

APPENDIX C

IN THE UNITED STATES DISTRICT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

MARCEL YOUAKIM and LINDA YOUAKIM, et al.,
Plaintiffs,
v.
JEROME MILLER, et al.,
Defendants.
No. 73 C 635

JUDGMENT AND ORDER

This matter coming on to be heard pursuant to the Memorandum Decision and Judgment of the Three Judge District Court, 374 F. Supp. 1204 (N.D. Ill. 1974), the judgment of the United States Supreme Court vacating the prior three-judge court judgment and remanding, —— U.S. ——, 96 S. Ct. 1399 (1976), and this Court's Memorandum Opinion and order dated July 27, 1976, and the Court having determined that the several provisions of this Decree are necessary to afford the plaintiffs and members of the plaintiff class the full equitable relief to which they are entitled:

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED THAT:

1. Ill. Rev. Stat. ch. 23 §§ 2212.05, 2212.17 and implementing policies and procedures of the Illinois Department of Children and Family Services ("DCFS") are contrary to 42 U.S.C. §§ 601 and 608, implementing federal regulations, and Department of Health, Education and Welfare Program Instruction API-PI-75-9 and are there-

fore invalid under the Supremacy Clause of the United States Constitution, Article VI. cl. 2 insofar as they exclude from eligibility, or deny full Aid to Families with Dependent Children-Foster Care payments (hereinafter, "full AFDC-F payments") under 42 U.S.C. § 608, or ancillary public assistance benefits and services under Titles IV, XIX and XX of the Social Security Act and the Food Stamp Act of 1964 (hereinafter "ancillary benefits"), to:

(a) defendent foster children otherwise eligible for these full AFDC-F payments and ancillary benefits, because such children live in foster family homes or child care institutions (hereinafter, "foster homes") maintained by foster parents or other persons (hereinafter, "foster parents") who are related to them;

(b) foster parents otherwise eligible for these full AFDC-F payments and ancillary benefits, because such parents maintain foster homes for foster children related to them.

2. 42 U.S.C. §§ 601 and 608 require that whenever a child has been or is removed from the home of a relative specified in 42 U.S.C. § 606(a) as the result of a judicial determination to the effect that continuation therein would be contrary to the welfare of such child and his placement and care are the responsibility of defendants, and such child is placed by defendants in a licensed or approved foster home maintained by relatives of the child, such child and those relatives shall be eligible for full AFDC-F payments and ancillary benefits to the same extent as a child placed in a foster home maintained by foster parents not related to the child, and such parents.

3. The plaintiff class in this case, pursuant to F.R.C.P. 23(a) and (b)(2) consists of:

(a) all persons eligible for AFDC-F payments and ancillary benefits, but who have been or are being denied such payments or benefits, in whole or in part, by defendants because they maintain foster homes for wards of the state (foster children) related to them.

(b) all wards of the state (foster children) eligible for AFDC-F payments and ancillary benefits, who have been or are being denied such payments or benefits, in whole or in part, by defendants because they are living in foster homes maintained by foster parents related to them.

(c) all wards of the state (foster children) not living with their relatives because such relatives have been unable to accept them as foster children without the full AFDC-F payments and ancillary benefits provided to foster families in which foster parents are unrelated to the foster children, and such relatives.

4. Defendants, their agents, employees and all other persons in active concert with them are enjoined from:

(a) enforcing Ill. Rev. Stat. ch. 23, §§ 2212.05, 2212.17, and 5005, and all implementing administrative policies and procedures, insofar as they exclude from eligibility, or deny full AFDC-F payments or ancillary benefits to, foster children living in foster homes maintained by related foster parents, and to these related foster parents, when such children and such parents are otherwise eligible for such payments and benefits;

(b) failing to pay full AFDC-F payments to foster children living in foster homes maintained by related foster parents, and to these related foster parents which such children and parents are otherwise eligible for such payments;

(c) failing to provide, or assist in providing, ancillary benefits to foster children living in foster homes maintained by related foster parents, and to these related foster parents, when such children and parents are otherwise eligible for such payments (to the same extent as defendants provide, or assist in providing, benefits to foster children living in foster homes maintained by unrelated foster parents, and to these unrelated foster parents).

5. Defendants shall make the first cash payment of full AFDC-F payments on or before October 1, 1976, to foster parents who currently have related foster children living with them. Such first payment shall be for the period July 27, 1976, to October 1, 1976, and for each such foster parent so paid such first payment, shall not be less (when added to other Aid to Families with Dependent Children payments for this period) than the amount of AFDC-F payments which would have been paid to each such parent had each been maintaining a foster home for unrelated foster children for this period.

6. On or before October 1, 1976, defendants shall, by the notice attached hereto as Exhibit A, inform all foster parents with whom related foster children are currently living, of the provisions of this Order, of their eligibility for full AFDC-F payments and ancillary benefits, and of the reason for the issuance of the first benefit payment described in paragraph 5.

7. Within forty (40) days from the date of the entry of this Order, defendants shall submit to the Court, for approval, policies and procedures issued pursuant to and implement this Order, amending existing provisions insofar as existing policies and procedures presently exclude from eligibility or deny full AFDC-F foster care pay-

ments and ancillary benefits to otherwise eligible foster children and foster parents related to them, because such foster children are living in foster homes maintained by such foster parents, and/or which are otherwise inconsistent with or frustrate the statutory policy of Title IV of the Social Security Act, 42 U.S.C. § 601 *et seq.*, favoring placement of such foster children in the homes of relatives. The policies and procedures which shall be modified and amended include, but are not limited to:

(a) DCFS regulations, including Regulation No. 5.12 (*Minimum Standards for Licensed Foster Family Homes*);

(b) DCFS Policies and Procedures Manual provisions, including Policy and Procedure §§ 2.14 (*Principles and Policies for Child Placement*), 2.16 (*Essential Elements in Foster Care*), 2.1.12 (*Selection of Foster Care Resource*), 2.21 (*Utilization of Foster Family Homes - Definition*);

(c) Placement Agreement Forms utilized in foster care placements;

(d) Purchase of Service Agreements, data record policies, memoranda, staff instructions, forms, computer programs, and other policies and procedures, if change therein is necessary to fully comply with and effectuate any provision of this Order.

Not less than ten (10) days prior to the date defendants submit to the Court for approval such policies and procedures, defendants shall serve upon the attorneys for plaintiffs a copy of said policies and procedures. After the Court approves such policies and procedures, including the amendments to existing provisions, defendants shall cause such policies and procedures to be promptly promulgated and effectuated.

8. Defendants shall take all necessary action, including but not limited to that described in subparagraphs (a), (b), and (c) hereof, to identify relatives capable of providing foster homes for defendants' wards currently residing in child care institutions or foster family homes maintained by unrelated persons. In any case where such a relative is willing to provide a foster home for the related child, placement and/or transfer decisions for the related foster child shall continue to be made under defendants' policies and procedures, as amended pursuant to this Order, and in the best interests of the child, but with due regard to the statutory policy, 42 U.S.C. § 601 *et seq.*, favoring placement of such a child in the home of a relative.

(a) For foster children not currently residing with relatives, defendants shall identify relatives from defendants' case files (and in the absence of sufficient information in the case files, by questioning the foster children and the relatives from whose home the child was removed). Defendants shall send to all such identified relatives the notice attached hereto as Exhibit B, by November 15, 1976.

(b) Whenever defendants shall receive a response from such relatives indicating that they are or may be willing to provide foster homes for foster children related to them, defendants shall take all action necessary to approve or disapprove the relatives' home and arrange placement or transfer, when appropriate, within two months after receiving such a response.

(c) Relatives who request that, and/or apply to have their home licensed or approved as a foster home, or who request and/or apply for the placement or transfer of a related foster child in or to their home, shall have the rights of hearing

and appeal provided pursuant to DCFS Regulation Nos. 2.18 and 5.02 in any case in which such requests or applications are denied or not acted upon promptly. In any case in which such an application or request is denied, the relative shall be entitled, when the denial is made, to notice of the reasons for such denial, and the reasons for such denial shall also be entered in the foster child's case record.

9. Defendants shall henceforth consider all placements and transfers of foster children and make all regular periodic evaluations of existing placements of foster children under defendants' policy and procedures, as amended pursuant to this Order, and in the best interests of the child, but with due regard to the statutory policy, 42 U.S.C. § 601 *et seq.*, favoring placement of such a child in the home of relatives.

10. Within ten (10) days from the entry of this Order, defendants shall cause to be directed to each DCFS administrator, caseworker, and other employee having responsibilities related to the AFDC-F program, a copy of this Order together with a notice stating that all DCFS policies and procedures inconsistent therewith are null, void, and of no further effect.

11. Defendants shall furnish to the Court and to plaintiffs' attorneys a report on or before November 1, 1976, attesting to the accomplishment of the provisions of paragraphs 4-7, 9 and 10 of this Order, and shall file on or before February 1, 1977, a report attesting to the accomplishment of the provisions of paragraph 8 of this Order.

12. This Court shall retain continuing jurisdiction over this action.

ENTER:
ALFRED Y. KIRKLAND,
Judge, United States
District Court.

Dated: August 24, 1976

Name of Related Foster Parent .....

ADDRESS .....

.....

Dear M— ..... (Related Foster Parent)

At the time that your relative(s) (*name of ward(s)*) was (were) placed in your home as (a) foster child(ren), and subsequently, the State of Illinois limited the assistance it could give to foster parents, such as yourself, who were related to foster children living with them. In general, the amount of cash assistance paid in such cases could be no more than $63.00 monthly for each related foster child, which was less than the amount which would have been paid if the foster child were not related.

Recently, however, a federal court has ruled that such a limitation on cash payments is unlawful, and that foster children placed in a relative's approved foster home are entitled to full cash assistance and services, to the same extent as foster children living in homes with foster parents unrelated to them. This has included a foster cash benefit to the related foster parent of $105 monthly for each related child living with them, as well as medical insurance coverage of the child under the "Medicaid" program, and other supportive services.

Under the federal court's decision, the cash benefits paid for foster children living in homes provided by relatives (such as yourself) must be increased. Enclosed is a check for $——— (or, Under separate cover, you have been (or will be) mailed a check for $———). This amount represents the increased amount owing you and (*name of ward(s)*) under the federal court's decision, for the period of July 27, 1976, the date of that decision, to October 1, 1976. For all periods after October 1, 1976 (unless and until you are duly notified to the contrary) you will receive an increased monthly benefit check of not less than $——— for each related foster child whom you are caring for in your home.

If you have any questions about any matter discussed in this letter, please feel free to call or write (*name of designated DCFS representative, address and phone number.*)

Sincerely,

.....
(Name of DCFS representative)

EXHIBIT A

Name of Relative .....

Address .....

.....

AN IMPORTANT NOTICE CONCERNING
(*NAME OF WARD(S)*)

Dear *M—*. (*Relative*):

As you may be aware, your relative(s) (*Name of Ward(s)*) is (are) (a) ward(s) of the State of Illinois and currently live(s) in (a foster home with non-relatives) [or] (name of institution).

The State of Illinois is responsible for the selection of the best possible home for its wards, and strives to place each foster child in the best possible home, preferably that of an adult relative.

At the time (*Ward(s)*) was (were) placed in a foster home, and subsequently, the State limited the assistance it would give to relatives for providing a home to a related foster child to approximately $63 per child each month, or less. A federal court has ruled, however, that such a limitation is unlawful, and that children placed in a relative's approved foster home are entitled to full assistance and services to the same extent as foster children living in homes with foster parents unrelated to them. This includes a foster care cash benefit to the relative of $———/month for each child, as well as medical insurance coverage of the child through the "Medicaid" program, and full supportive services.

If you feel that the increase in money and services allows you to care for (*Ward(s)*) in your home, call or write (*DCFS Designated Representative, Address and Phone Number*) and indicate your wish to be considered as (his/her/their) foster parent(s). We will then inform you of how to go about being approved as a foster home.

If you are not able to be a foster parent but know of others related to (*Ward(s)*) who might be interested, please give them this notice or provide us with their names, addresses and telephone numbers.

The State regularly reviews its foster placements. Therefore, even if you are not interested in being (*Ward's(')*) foster parent now, but are interested in becoming a foster parent at some future time, do not hesitate to express your interest at that time to (*Designated DCFS Representative, Addresss and Phone Number*).

Sincerely,

.....

(Name of DCFS Representative)

EXHIBIT B

APPENDIX D

APPENDIX D

SUPREME COURT OF THE UNITED STATES

No. 73-6935

Marcel Youakim et al., Appellants, v. Jerome Miller, Individually and as Director of the Department of Children and Family Services, et al.	On Appeal from the United States District Court for the Northern District of Illinois.

[March 31, 1976]

PER CURIAM.

As part of the federal Aid to Families with Dependent Children (AFDC) program, 42 U. S. C. § 601 *et seq.*, the State of Illinois provides federally subsidized foster care (AFDC-FC) payments of $105 per month for a dependent child placed with unrelated foster parents. Under Illinois' administration of the program no foster care payments are made to foster parents who are related to the foster child. Related foster parents are eligible, however, to receive payments under the State's regular AFDC program for the support of dependent children in the amount of $63 per month. These payments are made without regard to the financial circumstances of the family caring for the child. In addition, as an exception to the State's regular policy, related foster parents, upon an adequate showing of financial need, may receive supplemental payments for child care which bring the payments in connection with the related foster child to approximately $105 per month.

Appellants are Linda Youakim and her husband, Marcel, and Linda's four minor brothers and sisters, Timothy, Mary Lou, Larry and Sherry Robertson. Since 1972, the Youakims have been foster parents of Timothy and Mary Lou. Larry and Sherry have been living in separate, unrelated foster care facilities since 1969. Because Linda is related to Timothy and Mary Lou, the Youakims were ineligible for AFDC-FC foster care payments. They did apply for and receive the smaller AFDC payments for both children. Alleging injury resulting from financial inability to provide adequate care for Timothy and Mary Lou and to bring Larry and Sherry into their foster family, appellants filed suit in the District Court against the state officials on behalf of themselves and all other persons similarly situated. Their complaint described the suit as an action to enjoin enforcement of the foster care payment scheme on the ground that it denied related foster families the equal protection of the laws and likewise discriminated against wards of the State and relatives who could not provide an adequate foster home without full foster care payments. They asked that a three-judge District Court convene and enjoin the enforcement of the Illinois statutes and regulations.

The three-judge court "approved" the Rule 23(b)(2) class, granted appellees' motion for summary judgment, and ultimately held that the "Illinois scheme does not deny plaintiffs the equal protection of the laws." 374 F. Supp. 1204, 1210 (ND Ill. 1974). The jurisdictional statement filed here expressly challenged the Illinois scheme both on equal protection grounds and on the ground of conflict with the Social Security Act. We noted probable jurisdiction. 420 U.S. 970 (1975).

Although the jurisdictional statement as to which we noted probable jurisdiction presented the question of conflict between the Illinois law and the Social Security Act, it appears that the Supremacy Clause claim was not presented to the District Court as an independent ground for invalidating the state law. The complaint described the suit as one seeking an injunction on equal protection grounds. The sole ground for relief expressly claimed in each of the three causes of action which the complaint purported to allege, as well as in the prayer for relief, was that the Illinois program denied appellants equal protection of the laws. It does not appear from the record in the District Court that as the case developed appellants rested on the Supremacy Clause as a separate basis for their injunction claim. Nor did the District Court address the relationship between state and federal law independently of the equal protection issue.

Ordinarily, this Court does not decide questions not raised or resolved in the lower court. *California* v. *Taylor*, 353 U.S. 553, 557 n. 2 (1957); *Lawn* v. *United States*, 355 U.S. 339, 362 n. 16 (1958). But as *Pollard* v. *United States*, 352 U.S. 354, 359 (1957), and *Brotherhood of Carpenters* v. *United States*, 330 U.S. 395, 412 (1947), for example, demonstrate, the rule is not inflexible. Cf. *Boynton* v. *Virginia*, 364 U.S. 454, 457 (1960). Its usual formulation is that "it is only in exceptional cases coming here from the federal courts that questions not pressed or passed upon below are reviewed." *Duignan* v. *United States*, 274 U.S. 195, 200 (1927). Here, as we shall describe, the circumstances justify our dealing with the issue of conflict between state and federal statute at least to the extent of vacating the judgment below and remanding the case for consideration of the claim that the Illinois foster care program is in conflict with the Social Security Act.

Initially, it should be noted that the statutory issue is not foreign to the subject matter of the complaint. Attacks on state welfare statutes often combine Equal Protection and Supremacy Clause issues. The latter question could surely have been pursued under the complaint filed in this case, which, as part of the "facts" incorporated by reference in each of the three carses of action, alleged that the Illinois program was in conflict with the policy of the United States expressed in Subchapter 4 of the Social Security Act, 42 U. S. C. §§ 601-625, specifically with the federal policy of encouraging the care of children in their own homes or in the homes of relatives wherever possible.

It is also apparent that the District Court was of the view that under *Townsend* v. *Swank*, 404 U.S. 282 (1971), "serious equal protection problems" might arise if "a State attempts to rely on the concept of fiscal integrity to limit beyond statutory standards the class eligible to receive federally subsidized payments." 374 F. Supp. at 1210. For this reason, the District Court compared federal and state law, and concluded that "far from being inconsistent with the federal scheme, the Illinois scheme in general seems to parallel it. . . . Thus the federal statute makes the same classification as the Illinois statutes." *Ibid.* Had appellants relied on the Supremacy Clause issue as a separate ground for decision it would appear that the claim would have been rejected by the District Court. In light of these circumstances, the case is at most only marginally subject to the rule that this Court will not consider issues "not pressed or passed upon" in the court below.

Beyond these considerations, on October 25, 1974, after the filing of the jurisdictional statement but before we

noted probable jurisdiction, the Department of Health, Education, and Welfare issued a "Program Instruction" stating that under the controlling federal law, "[w]hen a child has been removed from his home by judicial determination and is placed in foster care under the various conditions specified . . ., the foster care rate of payment prevails regardless of whether or not the foster care home is operated by a relative." Also, in response to appellants' jurisdictional statement, the Solicitor General filed a statement in this Court urging that the Illinois foster care program was inconsistent with the Social Security Act insofar as it provided lower payments to unrelated foster parents than to those who were related. Neither the appellants nor the District Court had the benefit of either of these developments when the case was in the lower court. The interpretation of a statute by an agency charged with its enforcement is a substantial factor to be considered in construing the statute. *New York State Dept. of Social Services* v. *Dublino*, 413 U.S. 405, 421 (1973); *Columbia Broadcasting System, Inc.* v. *Democratic National Committee*, 412 U.S. 94, 121 (1973); *Investment Company Institute* v. *Camp*, 401 U.S. 617, 626-627 (1971) and appellants[1] now wish to press the issue of conflict between the state and federal law. We think that it is appropriate to afford them the opportunity to do so, but that the claim should be aired first in the District Court. Vacating the judgment and remanding the case for this purpose will require the District Court first to decide the statutory issue, *Hagans* v. *Lavine*, 415 U.S. 528 (1974), and if appellants prevail on that question, it will be unnecessary for either the District Court or this Court to

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1. The appellee state officials have met both of appellants' claims on the merits and have not sought to restrict our review to the equal protection issue.

reach the equal protection issue at all. A remand is thus consistent with our usual practice of avoiding decisions on constitutional matters if a case may be resolved on other grounds.[2]

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2. From papers lodged with the Court, it appears, and appellants do not dispute, that since September 1, 1974, the Youakims have been receiving need-based payments supplementing the AFDC payments for Timothy and Mary Lou. They now receive monthly payments totaling $105, the same amount they would receive under the AFDC-FC program. Their receipt of these payments does not moot the case. The complaint alleged that ineligibility for regular foster care payments had precluded the Youakims "from even considering accepting for foster care the [two] other family members" who are living with nonrelatives in other foster care facilities. App. 12. Were it not for the Illinois program, they allege, the Youakims could seek to bring Larry and Sherry into their foster home and would receive the same monthly $105 AFDC-FC payments per child received as a matter of course by the foster care facilities now caring for Larry and Sherry without any showing of need and without applying for need-based funds supplementing the $63 AFDC payments. Whatever its strength, the Youakims' claim that it is unlawful to require them to demonstrate need and to rely on an exception to policy in order to receive the same child care payments is not mooted by current receipt of larger payments for Timothy and Mary Lou who are living in the Youakim home. Because we conclude that the case is not moot as to the Youakims, we need not decide whether the District Court properly identified the Rule 23(b)(2) class, compare *Sosna* v. *Iowa*, 419 U.S. 393 (1975), with *Indianapolis School Comm'rs* v. *Jacobs*, 420 U.S. 128 (1975), so that the class action might be maintained notwithstanding mootness as to the named plaintiffs, or whether appellant Linda Youakim properly sued as "next friend" of her four brothers and sisters, see Fed. Rule Civ. Proc. 17(c), so that their constitutional interests could be adjudicated by the court.

The action we take here is similar to the order the Court entered in *Thorpe* v. *Housing Authority of Durham*, 386 U.S. 670 (1967). There, rather than deciding the constitutionality of an eviction from a public housing project, the Court remanded the case for reconsideration in light of a supervening administrative directive which was issued by federal authorities and which it was thought might provide a nonconstitutional basis for decision. *Cf. Richardson* v. *Wright*, 405 U.S. 208, 209 (1972).

The judgment of the District Court is vacated and the case is remanded to that court for further proceedings consistent with this opinion.

So ordered.

MR. JUSTICE STEVENS took no part in the consideration or decision of this case.

APPENDIX E

APPENDIX E

UNITED STATES DISTRICT COURT
NORTHERN DIVISION ILLINOIS,
EASTERN DISTRICT

Feb. 28, 1974

MARCEL YOUAKIM et al.,
Plaintiffs,

v.

JEROME MILLER Individually and as Director of the Department of Children and Family Services and the Department of Children and Family Services, of the State of Illinois,
Defendants.

No. 73 C 635

MEMORANDUM OF DECISION

TONE, District Judge.

This suit was commenced as a class action to enjoin the operation of the Illinois foster home program. Under that program foster parents who provide homes for children unrelated to them receive monthly foster care payments from the Department of Children and Family Services, but foster parents who provide homes for children related to them do not receive such payments. Because plaintiffs seek to enjoin the operation of a state statute, a three-judge court was convened pursuant to 28 U.S.C. §§ 2281, 2284. Defendants have now moved to strike and dismiss.

The Illinois statutory scheme allocates federally subsidized payments to foster parents who care for children who are wards of the state. Section 5 of the Department of Children and Family Services Act, Ill. Rev. Stat., 1971, Ch. 23, § 5005, empowers the Department ("CFS") and its Director to

(a) establish rules and regulations concerning foster care;

(b) accept for care and placement in foster homes children adjudicated wards of the state; and

(c) make payments for the board, clothing, care, training and supervision of children placed in licensed foster homes.

Under the Department's eligibility criteria, eligibility for monthly payments, which now approximate $105 per child, depends upon the economic status of the home from which the child was removed, not on the wealth of the foster parents. By authorizing payments only to licensed homes, Section 5 denies eligibility to foster parents providing homes for children related to them, because those foster parents are exempt from licensing under the Child Care Act of 1969, Ill. Rev. Stat., 1971, Ch. 23, §§ 2212.05, 2212.17, and thus cannot be licensed.[1] Foster parents caring for related

1. The parties have directed their arguments primarily to the Illinois Department of Children and Family Services Manual at 95-97 as the authority for denying payments to related foster parents. This manual, however, merely states that "[t]he Department has no statutory authority to pay relatives for the care of children," and thus does no more than summarize what is apparent on the face of the statutes. For the purposes of this opinion, then, Ill. Rev. Stat., 1971, Ch. 23, §§ 2212.05, 2212.17, and 5005 will be considered as the challenged statutes.

children are eligible for Aid to Families with Dependent Children ("AFDC") payments under Ill. Rev. Stat., 1971, Ch. 23, §§ 4-1 to 4-11, but in order to receive these payments they must make a separate application to the Department of Public Aid, and more importantly, these monthly payments are only about $63.00 per child. In addition to the AFDC payments, some foster families in which the parents and children are related receive additional funds from the Social Service Administration up to the amount of the foster care payments, if the Department of Children and Family Services makes a determination of need. This exception to the general practice is explained only in the CFS placement manual, but according to an affidavit filed by an administrator of CFS, approximately 140 of the 1500 related foster families in the state now receive this extra allowance.

Plaintiffs are Marcel and Linda Youakim, husband and wife; Timothy and Mary Lou Robertson, the minor brother and sister of Linda Youakim who have been living with their foster parents the Youakims since 1972; and Larry and Sherry Robertson, the minor brother and sister of Linda Youakim who have been living in foster care facilities operated by persons unrelated to them since 1969. The Youakims allege that because they do not receive the full foster care payments, they suffer severe financial hardship in caring for Timothy and Mary Lou, and are financially unable to take in Larry and Sherry. On behalf of themselves and all other persons similarly situated, plaintiffs assert that the distinction between related and unrelated foster parents for the purpose of determining eligibility for foster care benefits denies them equal protection of the laws as guaranteed by the Fourteenth Amendment, and they ask that defendants, the Illinois Department of Family Services and its director, be enjoined from enforcing, applying or executing this program.

Pursuant to Rule 12(b) of the Federal Rules of Civil Procedure, defendants have moved to strike and dismiss the complaint, asserting, in addition to an abstention ground which we do not reach, that

(1) the Court does not have jurisdiction over the subject matter;

(2) the action should not be maintained as a class action; and

(3) plaintiffs have failed to state a claim upon which relief may be granted.

Both sides having filed affidavits asserting facts outside the pleadings, we treat the motion as one for summary judgment, as we are authorized to do by the last sentence of Rule 12(b).

At the oral argument plaintiffs urged that an evidentiary hearing should be held. In the view we take of the case, if the evidence most favorable to plaintiffs' contentions is assumed, judgment must be entered for defendants. An evidentiary hearing is, therefore, unnecessary.

Jurisdiction.

Defendants argue that this Court lacks jurisdiction because the action is in effect against the State of Illinois and therefore is barred by the sovereign immunity provision of the Eleventh Amendment. This argument is without merit. Beginning with Ex parte Young, 209 U.S. 123, 28 S. Ct. 441, 52 L. Ed. 714 (1908), it has been held that a suit to restrain unconstitutional action threatened by an individual who is a state officer is not a suit against the state and thus is not prohibited by the Eleventh Amendment. This rationale has been consistently followed in numerous civil rights cases and other actions where the application or execution of state statutes has been enjoined, *cf.* Townsend v. Swank, 404 U.S. 282, 92 S. Ct. 502, 30 L.

Ed. 2d 448 (1972); Shapiro v. Thompson, 394 U.S. 618, 89 S. Ct. 1322, 22 L. Ed. 2d 600 (1969), and has been applied to permit suits against state officials to test the constitutionality of statutes under which they are acting, Hill v. Wallace, 259 U.S. 44, 42 S. Ct. 453, 66 L. Ed. 822 (1922); Hammer v. Dagenhart, 247 U.S. 251, 38 S. Ct. 529, 62 L. Ed. 1101 (1918). Indeed, under this rationale courts have assumed jurisdiction over many recent suits against state officials brought for the purpose of attacking social welfare schemes similar to the one here in question. *Cf., e. g.,* Gaither v. Sterrett, 346 F. Supp. 1095 (N.D. Ind. 1972); Jefferies v. Sugarman, 345 F. Supp. 172 (S.D.N.Y. 1972); Dimery v. Department of Social Services, 344 F. Supp. 1181 (S.D. Iowa 1972); Alexander v. Swank, 314 F. Supp. 1082 (N.D. Ill. 1970). The Court has jurisdiction to decide this case.

Class Action Issue.

Another preliminary question is the propriety of maintaining this action as a class action. If the requirements of Rule 23, F.R.Civ.P., are met, a court normally must approve a class action. Fujishima v. Board of Education, 460 F. 2d 1355, 1360 (7th Cir. 1972); but see Ihrke v. Northern States Power Co., 459 F. 2d 566, 572 (8th Cir. 1972). Defendants argue that the claims of the named plaintiffs are not typical because not all foster parents will be financially unable to care for children related to them if they do not receive payments from the state. This argument ignores the basis of plaintiffs' claims. Plaintiffs are not challenging a system where payments are made to some and denied to others on the basis of need, but a scheme whereby, irrespective of the individualized needs of the foster parents, payments are made to families where the foster parents and children are unrelated, but, as a

general rule, not to related foster families. The exception to the general policy allows payments to be related foster families in certain cases, but even in light of this, related foster parents as a class are treated differently than unrelated foster parents, because in order to qualify under this exception they must meet a certain level of need which the unrelated foster parents do not have to meet. Thus, the interests of the named plaintiffs are typical of the class and, the other requirements of Rule 23 also having been met, the class action will be approved.

Other Preliminary Matters.

Before proceeding to the merits, we must first dispose of several other matters. One of these is plaintiffs' motion to strike certain allegations of an affidavit in support of defendants' motion by Frank J. Kopecky, Chief Counsel for CFS. Plaintiffs first seek to strike reference to the exception to the scheme under attack whereby under certain circumstances related foster parents are given payments in an amount equal to those given to unrelated foster parents. This motion will be denied, for plaintiffs have not presented adequate grounds to strike these allegations, and plaintiffs themselves have filed affidavits which refer to the same exception. Next, plaintiffs seek to strike an allegation in the affidavit which refers to an administrative determination as the basis for the Department's policy of generally not paying related foster parents. This allegation will be stricken because of the affiant's failure to state specific facts from which we can determine his personal knowledge of this matter. Finally, plaintiffs seek to strike statements relating to the respective jurisdictions of the Department of Public Aid and the Department of Children and Family Services. Plaintiffs' motion in this respect will be denied, the affiant being capable of testifying as to these matters from his own personal knowledge.

The Merits.

We turn now to the equal protection question. A state statute dealing with social welfare need only be rationally based and free from invidious discrimination. Dandridge v. Williams, 397 U.S. 471, 90 S. Ct. 1153, 25 L. Ed. 2d 491 (1970). Since the statutes challenged here fall within the category governed by the *Dandridge* rule, their validity depends upon whether the distinction between related and unrelated foster parents is based on differences that are reasonably related to the legitimate purposes of the foster care program. Morey v. Doud, 354 U.S. 457, 77 S. Ct. 1344, 1 L. Ed. 2d 1485 (1953).

Plaintiffs argue that, by providing for state aid only to foster parents who are unrelated to the child and denying it to others, the state has breached its duty to provide equally for all dependent children and has in fact contributed to the breakup of family homes. They assert that since related foster parents have the same need for state subsidies to provide adequately for their foster children as do unrelated foster parents, there is no basis for the distinction. Although this statement of the state's duty may indeed be correct, plaintiffs have failed to recognize both the purpose for which the payments are made and the test to be employed in examining the classification of the statute. When a classification in a law such as this is called into question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed. Morey v. Doud, *supra*, 354 U.S. 457; Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 31 S. Ct. 337, 55 L. Ed. 369 (1911).

At the time this statute was enacted, the Illinois General Assembly could reasonably have been concerned

about how to use available public funds to provide as many foster homes as possible. It could reasonably have set out to provide for allocation of the available funds in a manner designed to secure the maximum number of foster parents for children who would otherwise remain parentless. A reasonable method of achieving this goal would have been to provide for the distribution of funds only to persons who would otherwise have had no particular reason or incentive for becoming foster parents rather than allocating the funds to all persons who become foster parents and thereby reducing the amount received by each; and it is on this basis that the defendants assert the classification was made. Allegedly, the state perceived a moral obligation on behalf of related foster parents to care for their related children which could not or would not be deepened by providing them a pro rata portion of the available funds. Therefore, according to the defendants, the state decided that the money which could have been allotted to related foster parents would be better used as added inducement to unrelated persons.

This classification, the wisdom of which is not for us to determine, bears a rationale relationship to the legitimate purpose of attempting to assure that foster homes are made available. Some related foster parents may not be able to afford the responsibility of caring for additional children,[2] but the state argues that the scheme was not enacted to alleviate this problem, and from the fact that payments are not based on the relative wealth of the foster parents, this contention is borne out. In this respect, the case at bar differs from United States Department of

2. Of course, this possibility is lessened by the fact that AFDC payments are generally available.

Agriculture v. Moreno, 413 U.S. 528, 93 S. Ct. 2821, 37 L. Ed. 2d 782 (1973), a case in which the Supreme Court held unconstitutional a statutory scheme which excluded from participation in the food stamp program any household containing an individual who is unrelated to any other member of the household. The critical point of that decision, and the basis upon which it is distinguishable from the case at bar, is that the purpose of the food stamp program was to alleviate hunger, and that to fulfill this purpose it had to be administered on the basis of need rather than on the basis of the relationships of the people constituting one economic unit and sharing cooking facilities.

More analogous to the case at bar is Ramos v. Montgomery, 313 F. Supp. 1179 (S.D. Cal. 1970), aff'd, 400 U.S. 1003, 91 S. Ct. 572, 27 L. Ed. 2d 618 (1971), a case involving a challenge to a California scheme under which AFDC payments made to natural parents were substantially less than payments made to foster parents. The Court in that case recognized that maintenance of the family structure was an important consideration in any child welfare program and that some natural parents were financially unable to provide suitable homes for their children, but nevertheless upheld the classification on the ground that the overriding purpose of the statute was the overall interest of the public in the protection of children[3] and that this purpose was

3. Among the stated purposes for which child welfare services are authorized under the Illinois Department of Children and Family Services Act are "protecting and caring for homeless dependent or neglected children"; "protecting and promoting the welfare of children, including the strengthening of their own families and counseling of family members"; and "providing adquate care of children away from their homes, where needed, in foster family homes." Ill. Rev. Stat., 1971, Ch. 23, § 5005. On the basis

reasonably served by a plan which was motivated to provide as many foster homes as possible.[4] The *Ramos* case is factually distinguishable from the case at bar, but the reasoning of the court is applicable here. A natural parent's responsibility to its child may stem from a legal duty, whereas a related foster parent's duty is moral, but in either case the result will generally be the same: the parent or relative is likely to care for the child. It is thus reasonable in either case for the state to adopt a program designed to induce families who would not otherwise become foster parents to assume that role.

The challenged classification will cause some children to be separated from their relatives for financial reasons. The state may reasonably have concluded, however, that the greater good of the greater number of children in need of foster homes is served by the classification which has been made. It may have concluded that if the classification were not made, the state's foster homes program would be jeopardized. As the class eligible to receive payments is

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4. Another basis for the decision in *Ramos* was that it was reasonable to expect that foster parents would incur expenses in meeting state licensing requirements which natural parents would not. Whether this rationale is also applicable to the case at bar is difficult to determine, for although relatives are not subject to licensing, they are kept under close scrutiny by CFS. In any event, it is not necessary for us to resolve this question.

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of this language, it can be inferred that, as in *Ramos*, although strengthening of the family unit is an important concern of the Act, the primary purpose of the Act is the protection and care of children generally.

made more inclusive, the individual payments become smaller. The possibility exists that if related persons are added to the eligible class, the individual payments would be reduced to an amount insufficient to induce qualified unrelated persons to provide foster homes for dependent children. Thus, the purpose of the payments would not be served, and either the fiscal integrity of the program would be impaired or the standards for approval of unrelated persons might have to be compromised.[5]

There is language in Townsend v. Swank, *supra*, 404 U.S. at 291, that serious equal protections problems may arise when a state attempts to rely on the concept of fiscal integrity to limit beyond federal statutory standards the class eligible to receive federally subsidized payments, but

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5. A consideration of the consequences of eliminating the classification which plaintiffs challenge will identify another rational basis for it. The payments which are the subject of this litigation are intended to subsidize care for children who have been adjudicated wards of the state. It is manifest that there are many children in Illinois whose natural parents are deceased but who, without being adjudicated wards of the state, are cared for by relatives who are their legal custodians, guardians, or perhaps even adoptive parents. Certainly the state has an interest in encouraging its citizens to care for related minors who have been orphaned by the death of their parents, either by adopting them, accepting the responsibilities of guardianship, or even merely taking informal custody of such minor children without having them adjudicated wards of the state. If the plaintiffs' attack on the Illinois program were sustained, relatives would have a financial inducement to cause orphaned children to be adjudicated wards of the state in order to qualify themselves for foster care payments. The state may rationally conclude that such a financial motivation would contravene the policy of the laws relating to adoption and guardianship.

plaintiffs' argument that that dictum invalidates the Illinois program in question here is of no avail. The regulations interpreting the Federal Social Security Act gives the states "substantial latitude and corresponding responsibility for determininag the coverage, nature, and scope of their public assistance programs," and limits this authority only to the extent that "the groups selected for inclusion in the plan . . . must not exclude individuals or groups on an arbitrary or unreasonable basis, and must not result in inequitable treatment of individuals or groups in the light of the provisions and purposes of the public assistance titles of the Social Security Act." 45 C.F.R. § 233.10. Far from being inconsistent with the federal scheme, the Illinois scheme in general seems to parallel it.[6] The federal statute authorizes aid to the natural parents and relatives of dependent children in one section, 42 U.S.C. § 606, and aid to foster parents in another, 42 U.S.C. § 608. Additionally, more money is allocated under the federal plan to foster care payments than to regular AFDC payments. 42 U.S.C. § 603(a)(1)(B); see Ramos v. Montgomery, *supra* 313 F. Supp. at 1182. Thus the federal statute makes the same classification as the Illinois statute.

The Illinois scheme does not deny plaintiffs equal protection of the laws. Summary judgment is entered in favor of defendants.

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6. Plaintiffs argue that the "exception to policy" under which some related foster parents receive additional allotments on the basis of need makes the state scheme unlike the federal. This is a variation, which the federal regulations explicitly allow, 45 C.F.R. § 233.10, but the two schemes are nevertheless parallel.

APPENDIX F

APPENDIX F

No. 76-1884

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MARCEL YOUAKIM and LINDA YOUAKIM, individually and as foster parents, TIMOTHY ROBERTSON, a minor, by his sister and next friend LINDA YOUAKIM, MARY LOU ROBERTSON, a minor, by her sister and next friend LINDA YOUAKIM, LARRY ROBERTSON, a minor, by his sister and next friend LINDA YOUAKIM, and SHERRY ROBERTSON, a minor, by her sister and next friend LINDA YOUAKIM, and all others similarly situated,

Plaintiffs-Appellees,

vs.

JEROME MILLER, individually and as Director of THE DEPARTMENT OF CHILDREN AND FAMILY SERVICES and THE DEPARTMENT OF CHILDREN AND FAMILY SERVICES OF THE STATE OF ILLINOIS,

Defendants-Appellants.

Dist. Court No. 73 C 635

NOTICE OF FILING AND PROOF OF SERVICE OF NOTICE OF APPEAL

TO: KENNETH KANDARAS
John Marshall Law School
315 South Plymouth Court
Chicago, Illinois 60604
JAMES D. WEILL
ROBERT LEHRER
Legal Assistance Foundation
343 South Dearborn, Rm. 800
Chicago, Illinois 60604
PATRICK A. KEENAN
University of Detroit School of Law
Legal Aid Clinic
651 East Jefferson
Detroit, Michigan 48226

YOU ARE HEREBY NOTIFIED that on November 3, 1977, we filed on behalf of Defendants-Appellants, the attached Notice of Appeal. A copy of said Notice of Appeal and a copy of the Notice of Filing and Proof of Service of Notice of Appeal is herewith served upon you.

WILLIAM J. SCOTT
Attorney General
State of Illinois
Attorney for Defendants-Appellants.
By: /s/ PAUL J. BARGIEL
PAUL J. BARGIEL
Assistant Attorney General
160 North LaSalle St., Rm. 800
Chicago, Illinois 60601 (793-5635)

STATE OF ILLINOIS }
COUNTY OF COOK }
SS

MARIE L. SULLIVAN, being first duly sworn, states that she served a copy of the above Notice of Filing and Proof of Service of Notice of Appeal and attached Notice of Appeal upon the attorneys of record at the addresses listed above, by mailing same, postpaid, in an envelope, properly addressed and mailed this 3rd day of November, 1977.

MARIE L. SULLIVAN

SUBSCRIBED AND SWORN to
before me this 3rd day
of November, 1977.
MAUREEN McMAHON

NOTARY PUBLIC

No. 76-1884

IN THE UNITED STATES COURT OF
APPEALS FOR THE SEVENTH CIRCUIT

MARCEL YOUAKIM and LINDA YOUAKIM, individually and as foster parents, TIMOTHY ROBERTSON, a minor, by his sister and next friend LINDA YOUAKIM, MARY LOU ROBERTSON, a minor, by her sister and next friend LINDA YOUAKIM, LARRY ROBERTSON, a minor, by his sister and next friend LINDA YOUAKIM, and SHERRY ROBERTSON, a minor, by her sister and next friend LINDA YOUAKIM, and all others similarly situated,

Plaintiffs-Appellees,

vs.

JEROME MILLER, individually and as Director of THE DEPARTMENT OF CHILDREN AND FAMILY SERVICES and THE DEPARTMENT OF CHILDREN AND FAMILY SERVICES OF THE STATE OF ILLINOIS,

Defendants-Appellants.

Dist. Court No.
73 C 635

NOTICE OF APPEAL TO THE
SUPREME COURT OF THE UNITED STATES

NOTICE IS HEREBY GIVEN that JEROME MILLER, et al., Appellants named above, by their Attorney, WILLIAM J. SCOTT, Attorney General of the State of Illinois, hereby Appeal to the Supreme Court of the United States from the final judgment of the United States Court of Appeals for the Seventh Circuit entered on September 27, 1977, which affirmed the decisions of the district court entered on July 27 and August 24, 1976.

This appeal is taken pursuant to 28 U.S.C. § 1254 (2).

WILLIAM J. SCOTT
Attorney General
State of Illinois

By: /s/ PAUL J. BARGIEL
PAUL J. BARGIEL
Assistant Attorney General
160 North LaSalle St., Rm. 800
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Supreme Court, U. S.
FILED
APR 12 1978
MICHAEL RODAK, JR., CLERK

APPENDIX

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-742

JEROME MILLER, ET. AL.,

Appellants

v.

MARCEL YOUAKIM, ET. AL.,

Appellees.

On Appeal From the United States Court of Appeals for the Seventh Circuit

JURISDICTIONAL STATEMENT FILED NOVEMBER 23, 1977
PROBABLE JURISDICTION NOTED FEBRUARY 21, 1978
Keenan Printing Company 312-648-0050 365

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-742

JEROME MILLER, ET. AL.,

Appellants

v.

MARCEL YOUAKIM, ET. AL.,

Appellees.

On Appeal From the United States Court of Appeals for the Seventh Circuit

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

1/21/74 Filed Plaintiffs' Second Amended Complaint Verified for injunctive relief.

4/ 2/73 Filed Defendants' notice of filing motion with Motion to Strike and Dismiss Complaint. (To stand as to Second Amended Complaint.)

4/16/73 Filed Plaintiffs' Motion to Convene Three-Judge District Court.

5/25/73 Filed Order Designating the Honorable John Paul Stevens, Circuit Judge, Honorable Abraham L. Marovitz, District Judge, and Honorable Philip W. Tone, District Judge to serve as members of a Three Judge Court.

2/28/74 Enter Memorandum of Decision (draft) Tone, J.

4/23/74 Filed Notice of Filing; Plaintiffs' Notice of Appeal to the Supreme Court of the United States. pd/$5.00.

3/24/75 Filed certified copy of order of U.S.S.C. dated March 17, 1975 noting probable jurisdiction.

4/ 7/76 Filed slip opinion from the Supreme Court of the U.S. with attached letter.

4/30/76 Filed certified copy of order from U.S. Supreme Court. Judgment vacated with costs; cause remanded to the United States District Court for the Northern District of Illinois for further proceedings in conformity with the opinion of this Court with transmittal letter dated April 28, 1976.

5/ 7/76 Enter order dated May 3, 1976: It appearing that this cause has been remanded for further proceedings and the cause was assigned to the

Calendar of Judge Tone who is no longer a judge of this Court, therefore, IT IS HEREBY ORDERED that this cause be reassigned by lot according to the rules. (JUDGE KIRKLAND) – Parsons, J.

6/11/76 Enter order dated June 10, 1976: Agreed motion for leave to file briefs in excess of 15 pages is granted. Brief for appellants, orief and arguments for defendant-appellees, reply brief for appellants and appendix previously filed in the Supreme Court are hereby filed in this court. Kirkland, J.

6/10/76 Filed plaintiffs' motion for preliminary injunction and for summary judgment.

6/14/76 Filed defendants' notice of filing motion with motion for summary judgment.

7/30/76 Enter order dated 7/27/76: Enter Memorandum Opinion and Order: Plaintiffs' motion for summary judgment is granted. Since plaintiffs have prevailed on the statutory issue, it is unnecessary for this Court to reach the equal protection issue. (Draft) – KIRKLAND, J.

8/24/76 Filed defendants-appellants' notice of filing and proof of service of notice of appeal with notice of appeal attached.

8/25/76 Enter order dated August 24, 1976: Enter judgment and order. Ill. Revised Statutes Chapter 23 §§ 2212.17 and implementing policies and procedures of the Illinois Department of Children and Family Services are contrary to 42 USC §§ 601 and 609 (sic.), implementing federal regulation and Department of HEW, etc., and are therefore invalid under the Supremacy

Clause of the United States Constitution, Art. VI Cla. 2 insofar as they exclude from eligibility or deny "full AFDC-F payments, etc., (DRAFT) Kirkland, J.

9/ 2/76 Filed Notice of Motion & Defendants' Motion for stay of enforcement pending appeal.

9/ 2/76 Enter order dated 9/2/76: Defendants' Motion for stay of enforcement pending appeal is denied. – KIRKLAND, J.

9/27/77 Enter Opinion of Court of Appeals for the Seventh Circuit affirming District Court Order with slight modification.

11/ 3/77 Filed Notice of Filing; Defendants' Notice of Appeal to the Supreme Court of the United States.

2/21/78 Supreme Court of the United States noted probable jurisdiction in this case. Mr. Justice Stevens took no part in the consideration or decision in this matter.

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF ILLINOIS

EASTERN DIVISION

MARCEL YOUAKIM and LINDA YOUAKIM individually and as foster parents, TIMOTHY ROBERTSON, a minor, by his sister and next friend LINDA YOUAKIM, MARY LOU ROBERTSON, a minor, by her sister and next friend LINDA YOUAKIM, LARRY ROBERTSON, a minor, by his sister and next friend LINDA YOUAKIM, and SHERRY ROBERTSON, a minor, by her sister and next friend LINDA YOUAKIM, and all others similarly situated,

Plaintiffs,

vs.

JEROME MILLER individually and as Director of the DEPARTMENT OF CHILDREN AND FAMILY SERVICES and the DEPARTMENT OF CHILDREN AND FAMILY SERVICES, of the STATE OF ILLINOIS,

Defendants.

Civil Action No. 73 C 635

Three-Judge Court Requested

SECOND AMENDED COMPLAINT VERIFIED FOR INJUNCTIVE RELIEF

PRELIMINARY STATEMENT

1. This is a civil rights class action wherein Plaintiffs seek a permanent injunction barring the State Director of the Illinois Department of Children and Family Services and his successors, employees, or agents, and all other persons in active concert and participation, from enforcing, applying, or executing Illinois Revised Statutes, Ch. 23, §§ 2212.05 and 2212.17 (1971) and Illinois Department of Children and Family Services Placement Manual, Ch. 3, § 5 at 95 through 97 (1972) as written, because said statutes and regulations violate equal protection of the law as guaranteed the Plaintiffs by the 14th Amendment to the United States Constitution. Said statutes and regulations authorize federally-subsidized foster care payments for foster parents who are unrelated to their foster children but deny said payments to Plaintiffs, who are foster parents of minor wards of the State—foster children—related to them.

JURISDICTION

2. Jurisdiction is conferred on this Court by 28 U.S.C. § 1343(3), (4) which provide for original jurisdiction of this Court in all suits authorized by 42 U.S.C. § 1983 to redress the deprivation under color of State law of any right, privilege or immunity secured by the Constitution of the United States.

3. This suit concerns the denial by Defendants of equal protection of the law as guaranteed the Plaintiffs by the Fourteenth Amendment to the United States Constitution.

THREE-JUDGE COURT

4. This is a proper case for determination by a three-judge court pursuant to 28 U.S.C. § 2281, 2284 since Plaintiffs seek an injunction to restrain the Defendant, who is a state officer, from the enforcement, application and execution of State statutes (Ill. Rev. Stats., Ch. 23 §§ 2212.05, 2212.17) and regulations (Illinois, Department of Children and Family Services Placement Manual, Ch. 3, § 5 at 95 through 97), of state-wide applicability on the grounds that said statutes and regulations are in violation of the Constitution of the United States.

PLAINTIFFS

5. Plaintiffs, Marcel Youakim and Linda R. Youakim, husband and wife, are citizens of the United States and have been residing in Des Plaines, Cook County, Illinois, since 1970. They are and have been the foster parents of Linda Youakim's brother, Timothy Robertson since January 7, 1972, and of her sister, Mary Lou Robertson since May 20, 1972. Plaintiff Marcel Youakim is related to Timothy and Mary Lou only by marriage.

6. Plaintiff, Timothy Robertson, is a minor citizen of the United States and has been living with his foster parents, Marcel and Linda Youakim in Des Plaines, Cook County, Illinois, since 1972. He is eight years old and a ward of the State of Illinois.

7. Plaintiff, Mary Lou Robertson, is a minor citizen of the United States and has been living with her foster parents, Marcel and Linda Youakim in Des Plaines, Cook County, Illinois, since 1972. She is ten years old and a ward of the State of Illinois.

8. Plaintiff, Larry Robertson, is a minor citizen of the United States and is and has been living in foster care facilities in the State of Illinois since May, 1969. He is thirteen years old and a ward of the State of Illinois. He does not now live with any other members of his family.

9. Plaintiff, Sherry Robertson, is a minor citizen of the United States and is and has been living in foster care facilities in the State of Illinois since May, 1969. She is fifteen years old and a ward of the State of Illinois. She does not now live with any other members of her family.

STATUTES AND REGULATIONS CHALLENGED

10a. Illinois law generally provides for payments to foster parents who care for children who are wards of the State. The homes of such foster parents are defined by statutes which state in relevant part:

> "Facility for child care" or "child care facility" means any person, . . . who or which receives or arranges for care of placement of one or more children, *unrelated* to the operator of the facility. Dept. of Children and Family Services. Ill. Rev. Stats., Ch. 23, § 2212.05 (1971)
>
> and
>
> "Foster family home" means a facility for child care in residences of families who receive no more than 8 children *unrelated* to them, ...
>
> Ch. 23, § 2212.17 (emphasis added) (Entire texts set out in Appendix A.)

The statutory scheme does not provide for payments to foster parents caring for minor wards of the State who are related to them.

10b. Regulations of the Illinois Department of Children and Family Services provide for payments to foster parents who care for children unrelated to them who are wards of the State. The regulatory scheme does not provide for foster parents caring for minor wards of the State who are related to them. The policy of non-payment to foster parents caring for children related to them states in relevant part:

> The Department has no statutory authority to pay relatives for care of children. Ill. DCFS Placement Manual, Ch. 3 § 5 at 97 (Entire text set out in Appendix F.)

The regulations however provide that payments may be made to foster parents caring for children related to them at an amount equal to those made to foster parents caring for children unrelated to them, as an exception to policy. (See Appendix F)

DEFENDANTS

11. Defendants, Jerome Miller, is the director of the Department of Children and Family Services. As such, he is the state official responsible for administering the Department of Children and Family Services Act which contains the challenged statutes and authorizes the challenged regulations, and for supervising the day-to-day operation of said Department.

12. Defendant Illinois Department of Children and Family Services acting pursuant to State law, and its Director, Jerome Miller, perform the following functions, inter alia:

a) established rules and regulations concerning . . . foster care;

b) accept for care and placement in foster homes children adjudicated wards of the state;

c) inspect and license foster homes;

d) authorize payment to foster parents caring for children unrelated to them.

Ill. Rev. Stats., 1971, ¶ 23 § 5005(4) (Statutes set out more fully in Appendix B.)

CLASS ACTION

13. The named Plaintiffs bring this action on their own behalf and, pursuant to Rule 23(a), (b)(2) of the Federal Rules of Civil Procedure, on behalf of all other persons similarly situated. The members of the class similarly situated are:

(i) all persons who maintain foster children related to them in their home and are refused full foster care payments because of said statutes and regulations.

(ii) all wards of the State (foster children) placed in the homes of foster parents to whom they are related and who are denied payments because of said statutes and regulations.

(iii) all wards of the State (foster children) unable to live with their relatives who cannot afford to accept them as foster children without full State subsidy—the same State subsidy as they receive while placed with non-relatives.

The requirements of Rule 23 are met in that: the class is so numerous that joinder of all members is unpracticable; there are questions of law and fact common to the class; the claims of the representative party are typical of the claims of the class; the representative party will fairly and adequately protect the interests of the class; and the party opposing the class has acted on grounds generally applicable to the class, thereby making appropriate injunctive relief with respect to the class as a whole.

FACTS

14. Plaintiffs Timothy, Mary Lou, Larry and Sherry Robertson, were made wards of the State of Illinois in May, 1969; and categorized by State officials to be foster children.

15. As a result of the classification of the children as foster children, they have been and are now placed in various State approved foster homes and foster care institutions.

16. Each of the State approved homes and foster care institutions receives foster care payments for caring for said children, except that Plaintiffs Youakim do not receive State foster payments.

17. On or about January 7, 1972, the home of Plaintiffs Marcel and Linda Youakim was approved by the Defendants as a proper placement facility and said Plaintiffs, related foster parents, accepted for foster care, Plaintiff Timothy Robertson.

18. In the progress of getting their home licensed as a State-approved foster care facility, Plaintiffs, related foster parents asked a social worker employed by Defendants Miller and the Illinois Department of Children and Family Services at the Defendants' offices at 4320 West Montrose, Chicago, Illinois, whether they would receive regular foster care payments.

19. The social worker at that time told Plaintiffs they would not receive the regular foster care payments because the law and policy denies these payments to related foster parents. Upon consultation with their counsel, Plaintiffs believe the foregoing to be an accurate statement of the Illinois law and policy.

20. Notwithstanding Defendants' refusal to grant the regular foster care payments to Plaintiffs, Defendants tendered, and Plaintiffs on January 7, 1972 entered into, a form "Home Placement Agreement," and accepted Timothy for foster care. A copy of this agreement is attached hereto and made part hereof (Exhibit I). The agreement was signed by all parties.

21. Said Home Placement Agreement is identical to that used by Defendants in approving and subsidizing approved foster homes, except as follows:

(i) The paragraph which provides that foster parents will be subsidized has been crossed out.
(ii) The word "foster" has been crossed out in thirteen places.
(iii) The word "relatives" is inserted in two places. (See Exhibit I).

22. On or about May 20, 1972 Plaintiff, minor ward of the State, Mary Lou Robertson, was similarly accepted for foster care by Plaintiffs Marcel and Linda Youakim, related foster parents.

23. Plaintiff related foster parents are informed and believe that their foster daughter, Plaintiff Mary Lou Robertson, has been removed from several foster homes during the past three years, and further, that Mary Lou is considered to have a "behavior problem" which is the cause of frequent moves.

24. It is Plaintiffs' opinion that Mary Lou does not have a behavior problem when living with them, and that she is happy and well-adjusted in their home.

25. Plaintiff related foster parents are informed and believe that they are providing their foster son Timothy with foster care of a quality equal to or better than the care he has received and would receive from foster parents unrelated to him. The basis for the information and the grounds for this belief are set out in the paragraphs following.

25(a) Plaintiff Timothy has difficulty breathing.

25(b) Prior to Timothy's placement with his present foster parents, Timothy said he had not received regular medical care for his condition.

25(c) Plaintiffs Marcel and Linda Youakim have, at great out-of-pocket expense, arranged for necessary medical care including the removal of Timothy's tonsils and adenoids.

25(d) Timothy's placement with Plaintiffs Youakim as his foster parents is *prima facie* the best placement for him because the guardian, Defendant Miller, has the legal duty to provide foster home placement that is in the best interests of the foster child. Presumably, the present placement is the best one available.

26. Plaintiffs are informed and believe that they are providing their foster daughter, Mary Lou with foster care of a quality equal to or better than the care she has received and would receive from foster parents unrelated to her. The basis for the information and the grounds for this belief are set out in the following paragraphs:

26(a) Mary Lou's teeth are not straight.

26(b) Prior to Mary Lou's placement with her present foster parents, Mary Lou said she had not received any dental or orthodontic care for her condition.

26(c) Plaintiffs Marcel and Linda Youakim have arranged several trips to an orthodontist for necessary dental care.

26(d) Mary Lou's placement with Plaintiffs Youakim as her foster parents is *prima facie* the best placement for her because the guardian, Defendant Miller, has the legal duty to provide foster home placement that is in the best interests of the foster child. Presumably, the present placement is the best one available.

27. Based on the above allegations, Plaintiffs believe it is in the best interests of Timothy and Mary Lou to live with them since, because they are related to their fos-

ter children, they are extraordinarily interested in their welfare, and determined to provide them the best quality care possible.

28. Because of Defendants' refusal to provide regular foster care payments, Plaintiff related foster parents have incurred substantially greater personal expense in caring for the foster children than similarly situated unrelated foster parents who receive the regular payments.

29. The amount of said expense borne by Plaintiff related foster parents has become so great that Plaintiffs are informed and believe and fear that they will be unable to continue providing foster care for the foster children unless Defendants grant payments in the amount equal to that paid to unrelated foster parents.

30. The refusal of Defendants to provide regular foster care payments to Plaintiff related foster parents has precluded Plaintiffs Youakim from even considering accepting for foster care the other family members, Plaintiff Larry Robertson (age 13) and Plaintiff Sherry Robertson (age 15), both wards of the State presently residing in other foster care facilities.

30(a) Sherry is presently placed with unrelated foster parents.

30(b) Larry is presently placed in an orphanage.

31. Plaintiff related foster parents are informed and believe that the best interest of all four children would be served if they could all live together in a family setting. Defendants' refusal to grant Plaintiffs foster care payments makes this impossible.

32. To partially reduce the burden of the cost of caring for the foster children, Plaintiffs Marcel and Linda Youakim have, on the advice of a social worker employed by Defendants, applied for and do now receive some child

support from the Cook County Department of Public Aid. The amount of said welfare payments is about $123.04 per month for two foster children and is substantially less than the amount of regular foster care payments, about $210.00 per month, they would receive but for being relatives.

33. The named Plaintiffs are informed and believe that:

33(a) Other members of the class are unaware of, or unable to procure the partial Public Aid subsidy; and do not now receive it;

33(b) The procedure for procuring a partial welfare subsidy is far more complex, burdensome, time consuming, and uncertain than the simple and regular foster care payment plan normally used by Defendants for unrelated foster homes.

33(c) All applications to, and all receipt of welfare payments from the Cook County Department of Public Aid have a certain stigmatizing effect on the applicant/recipient, and this serves as a further deterrent to and thus discrimination against acceptance of related wards of the State for foster care. Plaintiffs Marcel and Linda Youakim would greatly prefer to receive full foster care payments from the Defendants rather than lesser welfare payments from the Department of Public Aid. Since they must seek and accept welfare payments to continue caring for Timothy and Mary Lou, Plaintiffs feel embarrassed and stigmatized in addition to being damaged by the difference in the amount.

33(d) Any difference in payment is damaging and discriminatory, and deters potentially qualified foster parents from accepting for foster care wards of the State related to them.

34. On information and belief, part or all of the funding for the Illinois Department of Children and Family Services and its foster care subsidy operators originate with the Federal Government (Cf. Social Security Act, Subchapter 4, 42 U.S.C. § 601 et seq. esp. § 625 and generally, Federal Child Welfare and Revenue Sharing Laws).

35. It is the policy of the United States to encourage the care of children in their own homes or the homes of relatives whenever possible. 42 U.S.C. 601. (Complete text set out in Appendix C).

36. Plaintiffs are informed and believe that nothing in the Federal law or regulations concerning foster care payments, bars said payments to related foster parents. 42 U.S.C. 608 (Complete text set out in Appendix E).

37. It is the declared policy of the State of Illinois to administer all its laws in the best interests of the children of the State and to protect and promote the welfare of the children, including the strengthening of their own families wherever possible. Juvenile Court Act, Ill. Rev. Stats., 1971 Ch. 37 § 701 et seq; Department of Children and Family Services Act, Ill. Rev. Stats. 1971, Ch. 23 § 5001 et seq., esp. § 5005 (Appendices D and B).

38. Defendants' denial of the foster care payments to related foster parents conflict with the policy of the United States and the State of Illinois set out in paragraphs 32 through 34 above.

FIRST CAUSE OF ACTION

39. Plaintiffs reallege and incorporate by reference paragraphs 1 through 38 above.

40. Defendants, relying upon the statutes and regulations set out in paragraphs 10(a) and 10(b), *supra,* refuse

to grant foster care payments to all persons, including Plaintiffs, who meet all State standards for foster homes, but who accept for foster care, or might accept for foster care, children—wards of the State—who are related to them.

41. Defendants, by granting foster care payments to qualified unrelated foster parents, and by refusing to grant such payments to qualified related foster parents, violate Plaintiff related foster parents' right to equal protection as guaranteed by the United States Constitution.

42. By acting as described, *supra,* Defendants create an invidious, arbitrary and capricious classification for which there is no rational basis and which serves no compelling State interest.

43. Defendant by refusing to grant foster care payments are causing immediate, irreparable, permanent and increasing injury to Plaintiff related foster parents for which there is no adequate remedy at law.

44. The challenged statutes and regulations are not saved by the stopgap provision of partial welfare payments from the Department of Public Aid for the reasons set out in paragraphs 33 and 34, *supra.*

SECOND CAUSE OF ACTION

45. Plaintiffs reallege and incorporate by reference paragraphs 1 through 38 above.

46. Defendants' action of granting foster care payments to qualified unrelated foster parents, and by refusing to grant such payments to qualified related foster parents, violates Plaintiff related foster children's right to equal protection as guaranteed by the United States Constitution.

47. By acting as described, *supra,* Defendants create an invidious, arbitrary and capricious classification for which there is no rational basis and which serves no compelling State interest.

48. Defendants by refusing to grant foster care payments are causing immediate, irreparable, permanent and increasing injury to Plaintiff related foster children for which there is no adequate remedy at law.

49. The challenged statutes and regulations are not saved by the stopgap provision of partial welfare payments from the Department of Public Aid for the reasons set out in paragraphs 33 and 34, *supra.*

THIRD CAUSE OF ACTION

50. Plaintiffs reallege and incorporate by reference paragraphs 1 through 38 above.

51. Defendants' action of granting foster care payments to qualified unrelated foster parents, and by refusing to grant such payments to qualified related foster parents, denies Plaintiff related foster children's right to equal protection by economically discriminating against those members of the class of Plaintiffs' children who could live with otherwise qualified and willing relatives but for the lack of State foster care payments. Foster children whose qualified relatives can afford to care for them without State payment, continue to receive the benefits of close family associations. Such discrimination based on wealth violates the Constitution of the United States, and the policy favoring placement with relatives wherever possible.

52. By acting as described, *supra,* Defendants create an invidious, arbitrary and capricious classification for which there is no rational basis and serves no compelling State interest.

53. Defendants by refusing to grant foster care payments are causing immediate, irreparable, permanent and increasing injury to Plaintiff related foster children for which there is no adequate remedy at law.

54. The challenged statutes and regulations are not saved by the stopgap provision of partial welfare payments from the Department of Public Aid for the reasons set out in paragraphs 33 and 34, *supra.*

PRAYER FOR RELIEF

55. Wherefore, Plaintiffs, on behalf of themselves and all others similarly situated respectfully pray:

55(a) That this Court assume jurisdiction of this cause and receive Plaintiffs' application for a Three-Judge District Court pursuant to 28 U.S.C. Secs. 2281, 2284;

55(b) That this Court immediately notify the Chief Judge of this Circuit of the application to convene a Three-Judge District Court pursuant to 28 U.S.C. Secs. 2281, 2284;

55(c) That a Three-Judge District Court be convened to hear and adjudicate all questions in the cause;

55(d) That the Three-Judge District Court determine by order, pursuant to Rule 23(c)(1) of the Federal Rules of Civil Procedure, that this action be maintained as a class action;

55(e) That the Three-Judge District Court enter a final judgment permanently enjoining the State Director of the Illinois Department of Children and Family Services, and his successors, employees, or agents, and all other persons in active concert and participation, from enforcing, applying, or executing Ill. Revised Statutes, Ch. 23, § 2212.05 and § 2212.17 and Illinois Department of Children

and Family Services Family Placement Manual, Ch. 5 § 3 at 95 through 97 as written because said statutes and regulations violate equal protection of the law as guaranteed by Plaintiffs by the Fourteenth Amendment to the Constitution of the United States.

55(f) That the Three-Judge District Court order such other relief as may be deemed just, including the costs of this action, and reasonable attorneys fees.

Respectfully submitted,

MARCEL YOUAKIM
LINDA YOUAKIM
MARY LOU ROBERTSON (a minor)
TIMOTHY ROBERTSON (a minor)
LARRY ROBERTSON (a minor)
SHERRY ROBERTSON (a minor)

/s/ Patrick A. Keenan
Attorney for Plaintiffs

Of Counsel: Bogdan Martinovich '74
De Paul University College
of Law

[Affidavit of Verification Omitted]

EXHIBIT I

State of Illinois

DEPARTMENT OF CHILDREN AND FAMILY SERVICES
Division of Child Welfare

RELATIVE HOME PLACEMENT AGREEMENT

Date of Placement 1/7/72

The Division of Child Welfare, Department of Children and Family Services, has approved the home of Mr. and Mrs. Marcel Youakim, address 1720 Mannheim Rd., Des Plaines, Ill., for the care of a foster child: Name: Timothy Robertson, Born 5/1/65.

* * *

The district worker will visit the above home in order to:

Know the child and keep informed regarding his adjustment.

Assist the * * * family and the child in problems that may arise.

Discuss information regarding the child's family and background in order to assist the * * * family in understanding and helping the child.

Plan for meeting the clothing, medical care, and other needs of the child.

Discuss any changes in planning for the child.

The Department has the right and authority to remove the child when it appears that this is in his best interests, and agrees to give at least two weeks notice prior to removal if at all possible. However, in those instances in which the Department receives substantiated evidence that the child is receiving improper care or treatment, the Department will remove the child immediately pending investigation. The * * * parents agree to cooperate with the Department and to:

Share with the worker their experiences with the child.

Comply with requirements for regular medical and dental examinations.

Report to the worker any illness of the child and any need for medical care.

Call a physician immediately and notify the district office as soon as possible in case of acute illness or accident.

Discuss any change in plans for the child with the worker.

Plan clothing and other needs with the worker.

Consult the worker regarding any extended trip being planned for the child. When the trip is out-of-state, consent from the district office is necessary.

Cooperate with the worker regarding visits between the child and his family either in the * * * home, office, or elsewhere; treat the parents courteously, and refrain from criticizing them in the child's presence.

Plan with the worker before making religious commitments for the child, such as baptism, confirmation, and church membership.

Keep confidential all information regarding the child and his family.

Make no arrangements for boarding other children without approval of the worker.

Report any changes in the * * * family's situation, or circumstances, which may affect the welfare of the child or the * * * family's ability to continue giving care. Give the worker at least two weeks notice, in any situation, when requesting that the child be removed. More than two weeks is often needed to complete planning for the child.

It is understood by both the worker and the * * * parents that the child is not placed for adoption in this * * * home, and that the child may be removed by the Department when it appears to be for the child's best interests.

This placement agreement, made in good faith and mutual confidence, is equally binding on the Department and the * * * ABOVE NAMED RELATIVES.

(District office stamp)

/s/ Marcel Youakim, 1/7/72
* * * M. Youakim
brother-in-law

/s/ Linda Youakim, 1/7/72
Sister—Linda Youakim

/s/ Christine Mendoza

(Department Representative) 1/7/72

EXHIBIT A TO COMPLAINT

Chapter 23 Illinois Revised Statutes

2212.05 Facility for child care, defined.] § 2.05. "Facility for child care" or "child care facility" means any person, group of persons, agency, association or organization, whether established for gain or otherwise, who or which receives or arranges for care or placement of one or more children, unrelated to the operator of the facility, apart from the parents, with or without the transfer of the right of custody in any facility as defined in this Act, established and maintained for the care of children.

2212.17 Foster family home and types of homes, defined.] § 2.17. "Foster family home" means a facility for child care in residences of families who receive no more than 8 children unrelated to them, unless all the children are of common parentage, for the purpose of providing family care and training for the children on a full-time basis. The family's own children, under 18 years of age, shall be included in determining the maximum number of children served. The term "foster family home" includes homes receiving children from any State-operated institution for child care; or from any agency established by a municipality or other political subdivision of the State of Illinois authorized to provide care for children outside their own homes. The types of foster family homes are defined as follows:

(a) "Boarding home" means a foster family home which receives payment for regular full-time care of a child or children.

(b) "Free home" means a foster family home other than an adoptive home which does not receive payments for the care of a child or children.

(c) "Adoptive home" means a foster family home which receives a child or children for the purpose of adopting the child or children.

(d) "Work-wage home" means a foster family home which receives a child or children who pay part or all of their board by rendering some services to the family not prohibited by the Child Labor Law[1] or by standards or regulations of the Department prescribed under this Act. The child or children may receive a wage in connection with the services rendered the foster family.

(e) "Agency-supervised home" means a foster family home under the direct and regular supervision of a licensed child welfare agency, of the Department of Children and Family Services, of a circuit court, or of any other State agency which has authority to place children in child care facilities, and which receives no more than 8 children, unless of common parentage, who are placed and are regularly supervised by one of the specified agencies.

(f) "Independent home" means a foster family home, other than an adoptive home, which receives no more than 4 children, unless of common parentage, directly from parents, or other legally responsible persons, by independent arrangement and which is not subject to direct and regular supervision of a specified agency except as such supervision pertains to licensing by the Department.

EXHIBIT B TO COMPLAINT

Chapter 23 Illinois Revised Statutes § 5001. Purpose

The purpose of this Act is to create a Department of Children and Family Services to provide social services to children and their families, to operate children's insti-

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1. Chapter 48, § 31.1 et seq.

tutions, and to provide certain other rehabilitative and residential services as enumerated in this Act. 1963, June 4, Laws 1963, p. 1061, § 1.

5005. Direct child welfare services.] § 5. To provide direct child welfare services when not available through other public or private child care or program facilities.

For purposes of this Section:

The term "children" means persons found within the State who are under the age of 18 years at the time of acceptance for service or care. The term also includes children under age 18 and children age 18 or more, but under age 21 who (1) are in foster care under order of a court and (2) were, at any time before August 1, 1969, recipients of foster care under Sections 6-4 or 12-8.6 of "The Illinois Public Aid Code", approved April 11, 1967, as amended.[1]

The term "child welfare services" means public social services which implement or substitute for parental care and supervision for the purpose of: (1) preventing or remedying or assisting in the solution of problems which may result in the neglect, abuse or exploitation of children; (2) protecting and caring for homeless, dependent or neglected children; (3) protecting and promoting the welfare of children, including the strengthening of their own families and counseling of family members; (4) providing adequate care of children away from their homes, where needed, in foster family homes or day care or other child care facilities; or (5) providing counseling for mentally retarded, physically, and socially handicapped children and their parents when not otherwise available.

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1. Chapter 23, §§ 6-4, 12-18.6.

The Department shall establish and maintain tax-supported child welfare services and extend and seek to improve voluntary services through the State, to the end that services and care shall be available on an equal basis throughout the State to children requiring such services.

For the purpose of insuring effective state-wide planning, development, and utilization of resources for the day care of children, operated under various auspices, the Department is hereby designated to coordinate all day care activities for children of the State and shall:

(1) Develop a comprehensive day-care plan for the State which identifies high-priority areas and groups, relating them to available resources, and identifying the most effective approaches to the use of existing day care services. The plan shall include methods and procedures for the development of additional day care resources for children to meet the goal of reducing short-run and long-run dependency and to provide necessary enrichment and stimulation to the education of young children. Recommendation shall be made for State policy on optimum use of private and public, local, state and federal resources. A written plan shall be submitted to the Governor, annually, on January 1, and shall include an evaluation of developments over the preceding year, including cost-benefit analyses of various arrangements.

(2) The Department shall conduct day care planning activities within the following priorities:

(a) development of voluntary day care resources wherever possible, with the provision for grants-in-aid only where demonstrated to be useful and necessary as incentives or supports;

(b) emphasis on service to children of recipients of public assistance where such service will allow training or employment of the parent toward achieving the goal of independence;

(c) Maximum employment of recipients of public assistance in day care centers and day care homes, operated in conjunction with short-term work training programs;

(d) care of children from families in stress and crisis whose members potentially may become, or are in danger of becoming, non-productive and dependent;

(e) expansion of family day care facilities wherever possible;

(f) location of centers in economically depressed neighborhoods, preferably in multi-service centers with cooperation of other agencies;

(g) use of existing facilities free of charge or for reasonable rental wherever possible in lieu of construction.

(3) Based on its planning activities, the Department shall actively stimulate the development of public and private resources at the local level. It shall also seek the fullest utilization of federal funds directly or indirectly available to the Department.

(4) Where appropriate, existing non-governmental agencies or associations shall be involved in planning by the Department.

The Department shall establish rules and regulations concerning its operation of programs established to meet these purposes, including but not limited to adoption, foster care, family counseling, protective services, service to unwed mothers, homemaker service, return of runaway children, and interstate services.

The Department may provide financial assistance, and shall establish rules and regulations concerning such assistance, to persons who adopt physically or mentally handicapped, older and other hard-to-place children who immediately prior to their adoption were legal wards of

the Department. The amount of assistance may vary, depending upon the needs of the child and the adoptive parents, but must be less than the monthly cost of care of the child in a foster home. Special purpose grants are allowed where the child requires special service but such costs may not exceed the amounts which similar services would cost the Department if it were to provide or secure them as guardian of the child.

The Department shall accept for care and training any child who has been adjudicated neglected or dependent committed to it pursuant to the "Juvenile Court Act".[2] The Department may, at its discretion except for those children also adjudicated neglected or dependent, accept for care and training any child who has been adjudicated delinquent or as a minor in need of supervision, under the "Juvenile Court Act", but no such child shall be committed to the Department by any court without the approval of the Department.

The Department may assume temporary custody of any child (1) if it has received a written consent to such temporary custody signed by the parents of the child or by the parent having custody of the child if the parents are not living together or by the guardian or custodian of the child if the child is not in the custody of either parent or (2) if the child is found in the State and neither a parent, guardian nor custodian of the child can be located. The Department shall have the authority, responsibilities and duties that a legal custodian of the child would have pursuant to Section 1-12 of the "Juvenile Court Act".[3] A

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2. Chapter 37, § 701-1 et seq.
3. Chapter 37, § 701-12.

parent, guardian or custodian of a child in the temporary custody of the Department who would have custody of the child if he were not in the temporary custody of the Department may deliver to the Department a signed request that the Department surrender the temporary custody of the child. The Department may retain temporary custody of the child for 10 days after the receipt of the request, during which period the Department may cause to be filed a petition pursuant to the "Juvenile Court Act". If a petition is so filed, the Department shall retain temporary custody of the child until the court orders otherwise. If a petition is not filed within the 10 day period, the child shall be surrendered to the custody of the requesting parent, guardian or custodian not later than the expiration of the 10 day period, at which time the authority and duties of the Department with respect to the temporary custody of the child shall terminate. The Department may place children under 18 years of age in licensed child care facilities when in the opinion of the Department, such placement would be for their best interest. Payment for board, clothing, care, training and supervision of any child placed in a licensed child care facility may be made by the Department, by the parents or guardians of the estates of those children, or by both the Department and the parents or guardians, except that no payments shall be made by the Department for any child placed in a licensed child care facility for board, clothing, care, training and supervision of such a child that exceed the average percapita cost of maintaining and of caring for a child in institutions for dependent or neglected children operated by the Department. However, such restriction on payments does not apply in cases where children require specialized care and treatment for problems of severe emotional disturbance, physical disability, social adjustment, or any combination thereof and suitable facilities for the placement of such children are not available at payment rates within the limitations set forth in this Section.

The Department may receive and shall use, in its entirety, for the benefit of children any gift, donation or bequest of money or other property which is received on behalf of such children, or any financial benefits to which such children are or may become entitled while under the jurisdiction or care of the Department.
Amended by P.A. 76-2041, § 1, eff. July 1, 1970; P.A. 77-1374, § 1, eff. Aug. 31, 1971.

APPENDIX C TO COMPLAINT

Title 42 United States Code
§ 601. Appropriations

For the purpose of encouraging the care of dependent children in their own homes or in the homes of relatives by enabling each State to furnish financial assistance and rehabilitation and other services, as far as practicable under the conditions in such State, to needy dependent children and the parents or relatives with whom they are living to help maintain and strengthen family life and to help such parents or relatives to attain or retain capability for the maximum self-support and personal independence consistent with the maintenance of continuing parental care and protection, there is authorized to be appropriated for each fiscal year a sum sufficient to carry out the purposes of this part. The sums made available under this section shall be used for making payments to States which have submitted, and had approved by the Secretary, State plans for aid and services to needy families with children.

Aug. 14, 1935, c. 531, Title IV, § 401, 49 Stat. 627; 1946 Reorg. Plan No. 2, § 4, eff. July 16, 1946, 11 F.R. 7873, 60 Stat. 1095; 1953 Reorg. Plan No. 1, §§ 5, 8, eff. Apr. 11, 1953, 18 F.R. 2053, 67 Stat. 631; Aug. 1, 1956, c. 836, Title III, § 312(a), 70 Stat. 848; July 25, 1962, Pub. L. 87-543, Title I, § 104(a)(4), (c)(2), 76 Stat. 185, 186; Jan. 2, 1968, Pub. L. 90-248, Title II, § 241(b)(1), 81 Stat. 916.

§ 625. "Child-welfare services" defined

For purposes of this subchapter, the term "child-welfare services" means public social services which supplement, or substitute for, parental care and supervision for the purpose of (1) preventing or remedying, or assisting in the solution of problems which may result, in the neglect, abuse, exploitation, or delinquency of children, (2) protecting and caring for homeless, dependent, or neglected children, (3) protecting and promoting the welfare of children of working mothers, and (4) otherwise protecting and promoting the welfare of children, including the strengthening of their own homes where possible, or where needed, the provision of adequate care of children away from their homes in foster family homes or day-care or other child-care facilities.

Aug. 14, 1935, c. 531, Title IV, § 425, as added Jan. 2, 1968, Pub. L. 90-248, Title II, § 240(c), 81 Stat. 914.

APPENDIX D TO COMPLAINT

Chapter 37 Illinois Revised Statutes

§ 701-2. Purpose and Policy

(1) The purpose of this Act is to secure for each minor subject hereto such care and guidance, preferably in his own home, as will serve the moral, emotional, mental and physical welfare of the minor and the best interests of the community; to preserve and strengthen the minor's family

ties whenever possible, removing him from the custody of his parents only when his welfare or safety or the protecthe public cannot be adequately safeguarded without removal; and, when the minor is removed from his own family, to secure for him custody, care and discipline as nearly as possible equivalent to that which should be given by his parents, and in cases where it should and can properly be done to place the minor in a family home so that he may become a member of the family by legal adoption or otherwise.

(2) In all proceedings under this Act the court may direct the course thereof so as promptly to ascertain the jurisdictional facts and fully to gather information bearing upon the current condition and future welfare of persons subject to this Act. This Act shall be administered in a spirit of humane concern, not only for the rights of the parties, but also for the fears and the limits of understanding of all who appear before the court.

(3) This Act shall be liberally construed to carry out the foregoing purpose and policy.

Laws 1965, p. 2585, § 1-2, eff. Jan. 1, 1966.

APPENDIX E TO COMPLAINT

Title 42 United States Code

42 § 608 PUBLIC HEALTH AND WELFARE

§ 608. Payment to States for foster home care of dependent children; definitions

Effective for the period beginning May 1, 1961—

(a) the term "dependent child" shall, notwithstanding section 606(a) of this title, also include a child (1) who would meet the requirements of such section 606(a) or of section 607 of this title except

for his removal after April 30, 1961, from the home of a relative (specified in such section 606(a)) as a result of a judicial determination to the effect that continuation therein would be contrary to the welfare of such child, (2) whose placement and care are the responsibility of (A) the State or local agency administering the State plan approved under section 602 of this title, or (B) any other public agency with whom the State agency administering or supervising the administration of such State plan has made an agreement which is still in effect and which includes provision for assuring development of a plan, satisfactory to such State agency, for such child as provided in paragraph (f)(1) and such other provisions as may be necessary to assure accomplishment of the objectives of the State plan approved under section 602 of this title, (3) who has been placed in a foster family home or child-care institution as a result of such determination, and (4) who (A) received aid under such State plan in or for the months in which court proceedings leading to such determination were initiated, or (B) (i) would have received such aid in or for such month if application had been made therefor, or (ii) in the case of a child who had been living with a relative specified in section 606(a) of this title within 6 months prior to the month in which such proceedings were initiated, would have received such aid in or for such month if in such month he had been living with (and removed from the home of) such a relative and application had been made therefor:

(b) the term "aid to families with dependent children" shall, notwithstanding section 606(b) of this title, include also foster care in behalf of a child described in paragraph (a) of this section—

(1) in the foster family home of any individual, whether the payment therefor is made to such individual or to a public or nonprofit private child-placement or child-care agency, or

(2) in a child-care institution, whether the payment therefor is made to such institution or to a public or non-profit private child-placement or child-care agency, but subject to limitations prescribed by the Secretary with a view to including as "aid to families with dependent children" in the case of such foster care in such institutions only those items which are included in such term in the case of foster care in the foster family home of an individual.

(c) the number of individuals counted under clause (A) of section 603(a)(1) of this title for any month shall include individuals (not otherwise included under such clause) with respect to whom expenditures were made in such month as aid to families with dependent children in the form of foster care; and

(d) services described in paragraph (f)(2) of this section shall be considered as part of the administration of the State plan for purposes of section 603(a)(3) of this title;

but only with respect to a State whose State plan approved under section 602 of this title—

(e) includes aid for any child described in paragraph (a) of this section, and

(f) includes provision for (1) development of a plan for each such child (including periodic review of the necessity for the child's being in a foster family home or child-care institution) to assure that he receives proper care and that services are provided which are designed to improve the conditions in the home from which he was removed or to otherwise make possible his being placed in the home of a relative specified in section 606(a) of this title, and (2) use by the State or local agency administering the State plan, to the maximum extent practicable, in placing such a child in a foster family home or child-care institu-

tion, of the services of employees, of the State public-welfare agency referred to in section 722(a) of this title (relating to allotments to States for child welfare services under sections 721-728 of this title) or of any local agency participating in the administration of the plan referred to in such section, who perform functions in the administration of such plan.

For purposes of this section, the term "foster family home" means a foster family home for children which is licensed by the State in which it is situated or has been approved, by the agency of such State responsible for licensing homes of this type, as meeting the standards established for such licensing; and the term "child-care institution" means a nonprofit private child-care institution which is licensed by the State in which it is situated or has been approved, by the agency of such State responsible for licensing or approval of institutions of this type, as meeting the standards established for such licensing. Aug. 14, 1935, c. 531, Title IV, § 408, as added May 8, 1961 Pub.L. 87-31, § 2, 75 Stat. 76, and amended July 25, 1962, Pub.L. 87-543, Title I, §§ 101(b)(2)(D), 104(a)(3)(F), (G), 131(b), 135(a)-(d), 155(a), 76 Stat. 180, 185, 193, 196, 197, 207; Jan. 2, 1968, Pub.L. 90-248, Title II, §§ 201(e)(4), 205(c), 81 Stat. 880, 892.

APPENDIX F TO COMPLAINT

ILLINOIS DEPARTMENT OF CHILDREN AND FAMILY SERVICES

Social Services—PLACEMENT MANUAL July 17, 1972
Chapter Three

SPECIAL CHILD CARE PROGRAMS

Part Five: PLACEMENT WITH RELATIVES

I. DEFINITION

"Relative" means a person having any of the following relationships to the child by blood, marriage, or adoption: grandparents, brother, sister, stepbrother, stepsister, uncle or aunt. By administrative interpretation the definition has been broadened to include great-uncle, great-aunt and great-grandparent. Such "related" persons are not subject to foster home licensing whereas all other "relative" homes are subject to study and licensing as a foster family home.

II. LEGAL BASE

The Act Creating the Department of Children and Family services authorizes provision of child welfare services which supplement or substitute parental care. Provision of such services does not preclude placement of a child under care with approved relatives.

III. SCOPE OF SERVICE

The primary consideration in placement of a child with relatives are the needs of the child. Such placement, if indicated, is designed to reinforce the child's identification with "family."

IV. CRITERIA

If a relative home is to be considered as a placement resource the home must reasonably meet the minimum standards cited in Chapter Two, Section IV. Relative resources should be explored for all children for whom placement is indicated with the exception of children relinquished for adoption.

V. INTAKE

A. Request for Service

(1) The district office should check with the Illinois Department of Public Aid as a potential financial resource for the child(ren) living with relatives at the time of referral or for whom relatives are interested in accepting for care.

(2) Form CFS-602, *Medical Report on An Adult or Child in a Licensed Child Care Facility,* must be completed for all members of the household if a relative home is being considered as a placement resource.

B. Evaluation

Interest and concern of relatives in the child(ren); the feeling of relatives toward parents; ability to cooperate with the Department; and, placement of choice of the parents and child(ren) must all be explored as essential elements for a successful placement.

C. Disposition

In all relative placements the district office should approach the court seeking a court order appointing the Guardianship Administrator or

the approved relative as guardian of the person of the child(ren) to insure the availability of a person to make decisions in behalf of the child(ren) and to prevent removal of the child(ren) by unauthorized persons.

VI. PROCEDURES FOLLOWING CASE ACCEPTANCE

A. The District Office will:

(1) Arrange for placement and authorize payment, if indicated and approved by Social Service Administrator, Metropolitan or Downstate Area.

(2) Supervise placement and provide casework services to the family or relatives on behalf of the child(ren).

B. The Relative will:

(1) Accept terms of placement such as duration and agency goals for the child(ren) and work cooperatively with the agency to achieve these goals.

(2) Respect the parents desires for religious training for the child(ren).

SPECIAL CHILD CARE PROGRAMS

I. PLACEMENT WITH RELATIVES

A. The Department has no statutory authority to pay relatives for the care of children. Only the Social Service Administrator of Metropolitan or

Downstate Area may authorize such payment and it will not be authorized without written approval. A request for payment of a relative shall include: summary of the child's situation; legal status; reason for considering the proposed placement as desirable for the child; financial circumstances of the relatives; and, monthly rate for which approval is requested.

B. If payment is to be made it shall be an *inclusive* rate which *does not exceed* the regular *rates* paid to *Division of Child Welfare foster family homes.*

C. Monthly payment to relatives is authorized by directing completed Form CFS-903, *Payment Authorization,* to the Division of Methods and Information Services, State Administrative Office, Springfield, 62706. Indicate in Section 4, Type of Payment #34 Relative—"legally exempt from licensing." Monthly amount to be entered in Section 5 Payments—Board. (See Chapter Two, Appendix 1, IIA—Monthly Payment Rate.)

D. Initial placement clothing may be authorized by use of Forms CFS-932, *Purchase Authorization,* and FA-13, *Invoice-Voucher.* The vendor(s) should direct the completed forms to the Division of Administrative Services, State Administrative Office, Springfield, 62706, for payment. (See Chapter Two, Appendix 1, II B—Initial Clothing Allowance.)

E. Form CFS-425, *Foster Home Placement Agreement,* is to be signed in duplicate by the relative payee and the district worker with changes to indicate the relationship of the caretaker(s) to the child. One copy is kept by the relative and the other filed in the child's record.

DEFENDANTS' MOTION TO STRIKE AND DISMISS COMPLAINT, TO STAND AS TO SECOND AMENDED COMPLAINT

Filed April 2, 1973

[Caption Omitted in Printing]

NOW COME Defendants JEROME MILLER, individually and as Director of the Illinois Department of Children and Family Services, and the DEPARTMENT OF CHILDREN AND FAMILY SERVICES, by their attorney WILLIAM J. SCOTT, Attorney General of the State of Illinois, and pursuant to Rule 12 of Federal Rules of Civil Procedure respectfully move this Court to strike and dismiss the Plaintiffs' Complaint. In support of this Motion, the Defendants herein state as follows:

1. The allegations contained in Plaintiffs' Complaint, which purport to set forth a violation of equal protection, specifically Ill. Rev. Stat. Chapter 23, Sections 2212.05 and 2212.17, are conclusory in nature and fail to state a cause of action or state a claim upon which relief may be granted.

A. Said statute as it stands is a valid legislative classification permissible under state and federal law and does not constitute arbitrary, capricious or invidious discrimination in violation of U.S.C. Constitutional Amendment 14.

2. This Court does not have jurisdiction over the subject matter as to these defendants.

A. Plaintiffs by bringing suit against the Department of Children and Family Services is in effect bringing suit against the State.

B. The State of Illinois has not consented to be sued by Plaintiffs in Federal Court and as such cannot be made subject of such suit by virtue of its grant of immunity by U.S.C. Constitutional Amendment II.

C. In the event this Court should determine that its jurisdiction does in fact attach hereto, it should abstain from exercising such jurisdiction by virtue of there being an effective remedy existing at the level of the State Courts.

3. The class action commenced herein is improperly brought and fails to meet the requirement demanded of such action in that:

A. The claims of Plaintiffs are not representative of the class as a whole.

B. The Plaintiffs as representative cannot adequately protect the interests of the class.

C. There is doubt as to whether there exists a common question of law or fact applicable to the entire class.

Respectfully submitted,

.....
WILLIAM J. SCOTT
Attorney General of Illinois

RICHARD L. RYAN
Special Ass't Atty General
(Of Counsel)

[Notice of Filing and Certificate of Service Omitted]

SUPREME COURT OF THE UNITED STATES

No. 73-6935

MARCEL YOUAKIM, ET AL., APPELLANTS

v.

JEROME MILLER, Individually and as Director of the Department of Children and Family Services, ET AL.

ON CONSIDERATION of the motion for leave to proceed herein *in forma pauperis,*

IT IS ORDERED by this Court that the said motion be, and the same is hereby granted.

March 17, 1975

Mr. Justice Douglas took no part in the consideration or decision of this motion.

PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION AND FOR SUMMARY JUDGMENT

Filed June 10, 1976

[Caption Omitted in Printing]

1. Now come the named Plaintiffs, by their attorney, PATRICK A. KEENAN, DePaul Law Clinic, and respectfully move that this Honorable Court enter a Preliminary Injunction pursuant to FRCP 65(a) or in the alternative, Summary Judgment, pursuant to FRCP 56 against the Defendants to prevent them from continuing in their refusal to pay full federally subsided (sic) foster care (AFDC-FC) payments to the members of the Plaintiff class.

2. The grounds for this Motion are that the Illinois practice of refusing the payments is in conflict with the Social Security Act and the applicable H.E.W. Program Instruction and with the Supremacy Clause of the U.S. Constitution.

3. This cause comes to be heard on remand from the U.S. Supreme Court which by its *per curiam* opinion herein which vacated the dismissal of the Complaint by the Three-Judge District Court, and requires this Court to consider first the statutory issue set out in paragraph 2. See *Youakim* v. *Miller,* 96 S. Ct. 1399 at 1402, 1976. (Copy attached as Exhibit A, 5 pages.)

4. The Social Security Act allows and requires the State to pay full AFDC-FC payments to children who are wards of the Juvenile Court who are placed in a licensed or approved foster family home of *any individual.* 42 U.S.C. § 608(b)(1). (emphasis added. Test (sic) of § 608 attached as Exhibit B, and set out at p. 31 of the Appendix filed in the Supreme Court.) There are no exclusions.

5. On October 25, 1974, the H.E.W. Social and Rehabilitation Service issued Program instruction APA-PI-75-9 which states in relevant part:

> When a child has been removed from his home by judicial determination and is placed in foster care under the various conditions specified in Section 408 of the Social Security Act and 45 CFR 233.110, the foster care rate of payment prevails regardless of whether or not the foster home is operated by a relative. A non-legally liable relative has no financial responsibility towards the child placed with him and the income and resources of such a relative are not factors in determining entitlement to a foster care payment.

(Program Instruction attached as Exhibit C and set out at pp. 27-29 of Plaintiffs' Brief filed in the Supreme Court.)

6. In response to the Supreme Court's invitation of October 15, 1974, that the Solicitor General filed an *amicus* brief, Solicitor Robert Bork stated as follows in his February 19, 1975, brief filed on behalf of H.E.W. in the Supreme Court:

> We submit that the Illinois policy of denying foster care AFDC benefits for children living with relatives is invalid because it conflicts with specific criteria for eligibility set forth in the Social Security Act . . .
> Amicus Memorandum 2

(attached as Exhibit D, 7 pages.)

7. Notwithstanding the clarity of the federal law, the Defendants persist in their refusal to comply therewith. On June 1, 1976, Illinois Assistant Attorney General Richard Regan (sic) told this Honorable Court, Judge Alfred Y. Kirkland presiding, that the Defendants refuse to comply with "H.E.W.'s position."

8. By their own affidavit filed herein on January 8, 1974, Defendants admitted that 1,500 DCFS wards are

placed in foster care in the homes of their relatives, but only approximately 140 are receiving the full amount of AFDC-FC benefits. In 1974, approximately 1,360 eligible DCFS wards did not receive the required benefits. (Affidavit of Ralph Hanibult attached as Exhibit E, set out in Appendix at 44.)

9. This cause has been pending since the original complaint was filed on March 13, 1973. During three years of litigation the members of the Plaintiff class have been denied the federally subsidized AFDC-FC payments to which they have a federal legal and constitutional right.

10. There are no contested issues of fact.

11. This Motion is supported by the Affidavits of Patrick A. Keenan and Jane Shay Lynch, attached hereto as Exhibit F. The Plaintiffs also refer to, and ask that their Second Amended Complaint filed January 21, 1974, be incorporated in these motions.

12. In addition to the authorities cited in the Plaintiffs-Appellants' Brief filed herewith, Plaintiffs respectfully ask that this Court consider the Seventh Circuit Court's recent Opinion in *Mandley* v. *Trainor,* 523 F. 2d 415 (1975) that Illinois may not declare ineligible persons who come within the federal definition of eligibility for categorical assistance. at 423.

13. WHEREFORE, for the reasons collectively assigned above, and to give effect to the federal law, the Plaintiffs respectfully pray that this Court enter a Preliminary Injunction against the Defendants, or in the alternative, enter a Summary Judgment for the Plaintiffs and against the Defendants to include the following relief:

13a. Enjoin the Defendants from execution of the state statutes or policies which deny full foster care (AFDC-FC) payments to Plaintiffs related foster children;

13b. In the alternative, declare, that the Statute which prevents licensure of foster homes operated by persons related to this foster children (Ill. Rev. Stat. Ch. 23, §§ 2212.05 and 2212.17, 1975) is in conflict with the federal Social Security Act and Regulations and can have no further effect. (statutes attached as Exhibit G, and set out at pp. 21-22 of Appendix.)

13c. In the alternative, strike the word "unrelated" from the foster home-licensure statutes. (Ill. Rev. Stat. Ch. 23, §§ 2212.05 and 2212.17 (1975));

13d. Order the defendants to enact and execute policies and procedures, to be first submitted to and approved by this Court, which will provide for full foster (AFDC-FC) payments to all Illinois children who are in foster care and who meet the eligibility criteria of 42 U.S.C. § 608, including those children who are related to their foster parents.

13e. For such other relief as may be deemed just, including appropriate costs and attorney's fees.

13f. In the event this Motion and relief is denied, to retain jurisdiction of this cause, and to consider the Plaintiffs' constitutional claims.

Respectfully submitted,

.....

/s/Patrick A. Keenan
PATRICK A. KEENAN
Attorney for Plaintiff.

PATRICK A. KEENAN
Attorney for Plaintiffs
DePaul Law Clinic
23 East Jackson Blvd.
Room 950
Chicago, Illinois 60604

EXHIBIT C TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION AND FOR SUMMARY JUDGMENT

DEPARTMENT OF HEALTH, EDUCATION AND WELFARE

SOCIAL AND REHABILITATION SERVICE
WASHINGTON, D.C. 20201

PROGRAM INSTRUCTION
APA-PI-75-9
October 25, 1974

TO: STATE AGENCIES ADMINISTERING APPROVED PUBLIC ASSISTANCE PLANS

SUBJECT: AFDC Foster Care

COMMENT: This program instruction is issued to resolve the problem of some States not licensing or approving the homes of non-legally liable relatives as foster care homes even though suitable foster care could be provided in the homes and payments made at the foster care rate when children are placed with relatives who meet all conditions of eligibility for AFDC-FC.

There have been several U.S. District Court decisions which have held that States may not refuse to provide the foster care rate to a foster home because it is operated by relatives who have no legal responsibility for support and care of the child.

In addition, the U.S. Supreme Court in the case of *Ramos* v. *Montgomery,* January 18, 1971, upheld making a higher payment for foster care than was provided under a state's standard for AFDC payments.

Under 45 CFR 233.110(a)(1), states must provide for aid in the form of foster care for each otherwise eligible child as specified in the Act and in 233.110(b). Federal financial participation is available for children who are placed in a foster home or non-profit private child-care institutions licensed or approved by the agency which is responsible for licensing or approval of such facilities in the State. These provisions apply regardless of whether the licensed or approved foster family home in which a child is placed is operated by a relative (with no legal responsibility to support the child). When a child has been removed from his home by judicial determination and is placed in foster care under the various conditions specified in Section 408 of the Social Security Act and 45 CFR 233.110, the foster care rate of payment prevails regardless of whether or not the foster home is operated by a relative. A non-legally liable relative has no financial responsibility towards the child placed with him and the income and resources of such a relative are not factors in determining entitlement to a foster care payment. It must be noted, too, that the 1967 amendments to the Social

Security Act liberalized Federal financial participation in the cost of foster care, recognizing foster family care is more costly than care in the child's own home.

INQUIRIES TO:

SRS Regional Commissioners
/s/John A. Svahn
JOHN A. SVAHN
Commissioner
Assistance Payments Administration

EXHIBIT D TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION AND FOR SUMMARY JUDGMENT

MEMORANDUM FOR THE UNITED STATES AS *AMICUS CURIAE*

Filed February, 1975

[Caption Omitted in Printing]

This memorandum is submitted in response to this Court's order of October 15, 1974, inviting the Solicitor General to present the views of the United States.

STATEMENT

The State of Illinois has a policy whereby it makes a substantial foster care (AFDC-FC) payment pursuant to the federal Aid to Families with Dependent Children (AFDC) program when children are placed in a foster home with persons who are not related, pursuant to a judicial determination that the children's original home is unsuitable for them. If, however, the persons providing the foster care in such circumstances are related to the children, Illinois denies them foster care payments, unless they can show a need therefor. The foster family may qualify for AFDC payments, which in Illinois are less than the AFDC-FC payments.

Appellants in this case are foster parents caring for children related to them, and the children themselves. They brought a class suit in the United States District Court for the Northern District of Illinois, contending that the Illinois practice of providing higher payments when the foster parents are unrelated to the children violates the Social Security Act and the Equal Protection Clause. A three-judge district court rejected these contentions and dismissed the suit (J.S. App. A).

ARGUMENT

We submit that the Illinois policy of denying foster care AFDC benefits for children living with relatives is invalid because it conflicts with specific criteria for eligibility set forth in the Social Security Act; and that the validity of this practice is a substantial question in the administration of the Social Security Act which warrants plenary review by this Court.

1. In order to qualify for AFDC benefits, a child must be a "dependent child" as defined in 42 U.S.C. 606(a). Under that definition, a child is dependent if it (1) has been deprived of parental support for specified reasons, (2) is living with a relative as defined in the section, and (3) is under 18 (or, in certain circumstances 21) years of age.[1] The AFDC foster care program is provided under 42 U.S.C. 608, which extended the definition of 'dependent

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1. 42 U.S.C. 606(a) provides:

When used in this part—

(a) The term "dependent child" means a needy child (1) who has been deprived of parental support or care by reason of the death, continued absence from the home, or physical or mental incapacity of a parent, and who is living with his father, mother, grandfather, grandmother, brother, sister, stepfather, stepmother, stepbrother, stepsister, uncle, aunt, first cousin, nephew, or neice, in a place of residence maintained by one or more of such relatives as his or their own home, and (2) who is (A) under the age of eighteen, or (B) under the age of twenty-one and (as determined by the State in accordance with standards prescribed by the Secretary) a student regularly attending a school, college, or university, or regularly attending a course of vocation or technical training designed to fit him for gainful employment.

child' to include certain children who, even though not living with relatives, live in foster homes as a result of a judicial determination that they should be removed from their regular homes.[2] A child is eligible for AFDC-FC if it

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2. 42 U.S.C. 608 (a) provides:

Effective for the period beginning May 1, 1961—

(a) the term "dependent child" shall, notwithstanding section 606(a) of this title, also include a child (1) who would meet the requirements of such section 606(a) or of section 607 of this title except for his removal after April 30, 1961, from the home of a relative (specified in such section 606(a)) as a result of a judicial determination to the affect that continuation therein would be contrary to the welfare of such child, (2) whose placement and care are the responsibility of (A) the State or local agency administering the State plan approved under section 602 of this title, or (B) any other public agency with whom the State agency administering or supervising the administration of such State plan has made an agreement which is still in affect and which includes provision for assuring development of a plan, satisfactory to such State agency, for such child as provided in paragraph (f)(1) and such other provisions as may be necessary to assure accomplishment of the objectives of the State plan approved under section 602 of this title, (3) who has been placed in a foster family home or child-care institution as a result of such determination, and (4) who (A) received aid under such State plan in or for the month in which court proceedings leading to such determination were initiated, or (B) (i) would have received such aid in or for such month if application had been made therefor, or (ii) in the case of a child who had been living with a relative specified in section 606(a) of this title within 6 months prior to the month in which such proceedings were initiated, would have received such aid in or for such month if in such month he had been living with (and removed from the home of) such a relative and application had been made therefore.

(1) is a "dependent child" as defined in section 608(a); (2) lives in a "foster family home" or a "child-care institution" as a result of a judicial determination that the child's home is not suitable for him (Section 608(f)); and (3) meets other conditions of Section 608, not in issue here.

Appellants concededly meet all of these conditions, and therefore qualify for AFDC-FC. The additional requirement imposed by the State of Illinois that children are entitled to AFDC-FC only if the foster home in which they are living is maintained by non-relatives is contrary to the decisions of this Court which have prohibited the states from narrowing specific federal eligibility criteria without congressional authorization. *Townsend* v. *Swank,* 404 U.S. 282, 285; *Carlson* v. *Remillard,* 406 U.S. 598, 601; *King* v. *Smith,* 392 U.S. 309, 333.[3]

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3. There have been several cases in which the state has been permitted to impose additional requirements as conditions of eligibility for AFDC. *Snell* v. *Wyman,* 393 U.S. 323, affirming 281 F. Supp. 853 (S.D. N.Y.); *Wyman* v. *James,* 400 U.S. 309; *Charleston* v. *Wohlgemuth,* 405 U.S. 970, affirming 332 F Supp. 1175 (E.D. Pa.); *New York State Department of Social Services* v. *Dublino,* 413 U.S. 405. The requirements upheld in those cases, however, were designed to further the purposes of the Social Security Act, such as seeking employment, permitting a home visit by social workers, or agreeing to reimburse the state for assistance received if funds therefore become available. Here, on the other hand, the Illinois system excludes from benefits a class of children who meet the statutory qualifications and, as shown *infra,* (P. 5), the disqualifying condition of living with a relative is opposed to rather than in furtherance of the design of the Social Security Act.

Appellees argue (Motion to Dismiss or Affirm, p. 15) that because the Social Security Act "indicates that children ought to be placed, when their return to their natural home is rendered impossible, in the home of a relative, and only thereafter in the home of a stranger * * * the law considers relatives of a child on a nearly equal basis with natural parents." From this they conclude that the state may treat children in foster homes of relatives as if they were still living with their parents, and therefore deny them foster-care payments. The argument is a *non sequitur.*

As already noted, the only qualification for foster-care benefits is that the child be "dependent" and that it be living in a foster home or a child-care institution as the result of a judicial determination that its own home is unsuitable. Those conditions were satisfied here, and the child is therefore entitled to foster-care benefits.

Appellees' argument, rather than supporting their conclusion, points in the opposite direction. The denial of foster-care benefits to children living with relatives is likely to make relatives unwilling to accept the children and lead to the placement of children in foster homes of non-relatives. This result would be inconsistent with the policy stated in 42 U.S.C. 401 that the AFDC program is aimed at "encouraging the care of dependent children in their own homes or in the homes of relatives * * *." Indeed, this policy was the primary basis upon which a district court invalidated, as inconsistent with the Social Security Act, the practice of South Dakota of denying foster-care payments for children living with relatives. *Clampett* v. *Madigan,* No. CIV73-4018, decided May 24, 1973 (D. S.D.). See, also, *Jackson* v. *Ohio Department of Public Welfare,* No. C72-182, decided April 17, 1972 (N.D. Ohio).

Appellants contend that *Ramos* v. *Montgomery,* 331 F. Supp. 1197 (S.D. Cal.), affirmed, 400 U.S. 1003, controls this case. That case, however, merely held that where a child was not eligible for foster-care benefits because he did not meet the condition in Section 608 that he had been removed from his home as a result of a judicial determination, the foster parents were not entitled to receive foster-care payments. The present case, however, involves the totally different situation where the child does qualify for foster-care payments but the state denies those payments because relatives provide the foster care.

2. The question is an important one in the administration of the Act. We are informed by the Department of Health, Education and Welfare that in addition to Illinois, 13 other states currently deny full foster-care payments to foster parents caring for related children. Approximately 23 percent of AFDC recipients are living in those states. The issue thus has substantial impact, and warrants definitive resolution by this Court.

CONCLUSION

Probable jurisdiction should be noted.

Respectfully submitted.

ROBERT R. BORK,
Solicitor General.

FEBRUARY, 1975.

DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Filed June 14, 1976

[Caption Omitted in Printing]

NOW COME Defendants herein by and through their attorney WILLIAM J. SCOTT, Attorney General of Illinois and respectfully move this honorable court pursuant to Rule 56 of the Federal Rules of Civil Procedure to grant Summary Judgment in their favor, and against Plaintiffs to this cause. In support of such motion Defendants state:

1. This cause comes to be heard on remand from the United States Supreme Court requiring consideration of the statutory issue concerning alleged conflict of Illinois policy and law with the Social Security Act.

2. The Social Security Act neither allows nor requires or in the alternative allows but does not require the State to pay full AFDC-FC funds to children who are wards of the Juvenile Court and placed in the home of a relative.

3. The Illinois statutory foster care scheme is consistent with the purpose, meaning and legislative history of the Social Security Act, and does not therefore violate said Act or the Supremacy Clause of the United States Constitution. Nor does the Illinois Scheme conflict with specific criteria for eligibility as set forth in the Social Security Act.

4. The Program Instruction of the Department of Health, Education and Welfare and the Amicus opinion of the Office of the Solicitor General are inconsistent with and in contravention to prior federal regulatory interpretation of the Social Security Act and in addition are contradictive of the meaning and purpose of the applicable sections of said Act.

5. The Program Instruction of the Department of Health, Education and Welfare #APA-PI-75-9 as issued on October 25, 1974, and as it may be relevant to this cause is not mandatory upon the states and does not carry regulatory weight or force of law.

6. There exists no federal statutory or constitutional right on the part of the Plaintiff class to receive subsidized AFDC-FC foster care payments from the State of Illinois or the federal government.

7. There are no material issues of fact in this matter and relief depends solely on judicial interpretation of law.

8. Defendants, as have Plaintiffs, submit their brief(s) as filed in the Supreme Court of the United States in support of this motion. Said brief is sufficient to address the issue of the alleged statutory conflict as required by remand instructions.

WHEREFORE in light of the foregoing motion and supportive brief and argument, it is respectfully moved that this honorable court grant Defendant's motion for summary judgment and deny summary judgment for Plaintiffs, all costs to be taxed to Plaintiffs.

Respectfully submitted,

WILLIAM J. SCOTT,
Attorney General of Illinois
160 North LaSalle Street
Chicago, Illinois 60601

RICHARD L. RYAN
Special Assistant Attorney General
(Of Counsel)

SUPREME COURT OF THE UNITED STATES

No. 77-742

JEROME MILLER, etc., et al.

Appellants.

v.

MARCEL YOUAKIM, et al.

APPEAL from the United States Court of Appeals for the Seventh Circuit. In this case probable jurisdiction is noted. Mr. Justice Stevens took no part in the consideration or decision of this matter.

February 21, 1978

Supreme Court, U. S.
FILED
JAN 7 1978
MICHAEL RODAK, JR., CLERK

No. 77-742

In the Supreme Court of the United States

OCTOBER TERM, 1977

JEROME MILLER, Individually and as Director of **THE DEPARTMENT OF CHILDREN AND FAMILY SERVICES** and **THE DEPARTMENT OF CHILDREN AND FAMILY SERVICES** of the **STATE OF ILLINOIS**,

Appellants,

vs.

MARCEL YOUAKIM and **LINDA YOUAKIM** individually and as foster parents, **TIMOTHY ROBERTSON**, a minor, by his sister and next friend **LINDA YOUAKIM**, **MARY LOU ROBERTSON**, a minor, by her sister and next friend **LINDA YOUAKIM**, **LARRY ROBERTSON**, a minor by his sister and next friend **LINDA YOUAKIM**, and **SHERRY ROBERTSON**, a minor, by her sister and next friend **LINDA YOUAKIM**, and all others similarly situated,

Appellees.

On Appeal From the United States Court of Appeals for the Seventh Circuit

MOTION TO AFFIRM

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Appellants,

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Appellees.

On Appeal From the United States Court of Appeals for the Seventh Circuit

MOTION TO AFFIRM

Appellees move that the final judgment and order of the Court of Appeals be affirmed on the ground that the Court's interpretation of the Social Security Act is manifestly correct in light of the plain meaning of the federal statute, the unanimous authority of the federal courts which have

considered the issue presented, the interpretation of the agency charged with the administration of the statute, and the opinion of the Solicitor General of the United States, and does not need further argument.

OPINION BELOW

The memorandum opinion and order of the Court of Appeals are reported at 562 F.2d 483 (7th Cir. 1977) and are set forth in Appendix B of appellants' Jurisdictional Statement.

JURISDICTION

The jurisdictional requirements are adequately set forth in the appellants' Jurisdictional Statement.

QUESTIONS PRESENTED

Does Illinois' denial of Federal Foster Care eligibility and benefits to needy children judicially removed from their homes, declared wards of the state, and placed in foster homes maintained by foster parents related to such children violate the Social Security Act §§401 and 408, 42 U.S.C. §§601, 608 (1970) and therefore the Supremacy Clause of the United States Constitution, U.S. CONST., art. VI, cl. 2.

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED

The relevant provisions are set forth at pp. 3-4 of appellants' Jurisdictional Statement, and in Appendix A thereto, with the exception of the following, which are set out in Appendix A of this Motion to Affirm:

> Department of Health, Education, and Welfare Program Instruction APA-PI-75-9 (October 24, 1974), Subject: AFDC-Foster Care
>
> 45 C.F.R. §233.110.
>
> Handbook of Public Assistance Administration, pt. IV §3452(a).

STATEMENT OF THE CASE

This case concerns Illinois' denial of the Federal Foster Care eligibility and benefits under the Social Security Act to minor wards of the state placed in the homes of foster parents who are related to them (e.g., grandparents, adult sisters and brothers). The verified complaint and uncontested facts indicate that in May, 1969, an Illinois Circuit Court determined that Timothy, Mary Lou, Larry, and Sherry Robertson were delinquent, otherwise in need of supervision, and neglected in their mother's home and declared them wards of the State of Illinois and, as such, foster children pursuant to *Ill.Rev.Stat.*, ch. 37 §§704-1—704-8 (1975). At the time they were declared wards, Timmy was 3, Mary Lou was 5, Larry was 8, and Sherry was 10 years of age. For three years, from 1969 to 1972, state officials placed the children in a variety of orphanages and foster homes of persons unrelated to them, to which the state officials paid full benefits under the Federal Foster Care program.

In 1972, after three years of state wardship, Timmy and Mary Lou Robertson were placed, as foster children, in the home of Michael Youakim. Michael Youakim's wife, Linda Youakim, is the adult sister of Timmy and Mary Lou Robertson. The Youakims were under no legal obligation to support Timmy and Mary Lou, nor were they obliged to accept the placement made by the state officials. See *Ill. Rev.Stat.*, ch. 23, §10-2 (1975). Nevertheless, after the officials had specifically approved the Youakims' home as meeting the standards for the care of a "foster child" and approved the Youakims as foster parents, the Youakims accepted the placement of Timmy and Mary Lou as foster children in their home. This approval was incorporated in a "Home Placement Agreement" which the state officials required the Youakims to sign, and which was ma-

terially identical to the form used with respect to all foster parents approved by the state officials—except that the officials struck the word "foster" in some, but not all, of the places it appeared on the form, and struck the paragraph providing that the foster parents would receive Foster Care benefits for the care of the children.

Solely because Mrs. Youakim was related to the children, the state officials, under prevailing state policy and practice, refused to provide Federal Foster Care benefits, which would have equalled $210 a month for the two children. The Youakims were forced to apply on behalf of the children for regular Aid to Families with Dependent Children ("AFDC") to provide in part for Timmy and Mary Lou. AFDC benefits were and are, however, substantially lower than federally-mandated Foster Care benefits, and do not include the social services specifically designed to meet the special needs of children judicially removed from their own homes by court order.

The Youakims, in providing foster care for Timmy and Mary Lou Robertson, incurred expenses substantially in excess of the AFDC benefits which the children received. Due to that strain on their resources, and the likelihood of an even greater strain should they accept more children without foster care benefits, the Youakims were unable to accept either Larry or Sherry Robertson into their home as foster children. Thus Larry remained in an orphanage, and Sherry in an unrelated foster home (both of which were eligible for full Federal Foster Care benefits in Illinois) and the Robertson children remained separated from one another at the time of the filing of this lawsuit.

The Youakims and the foster children herein claim that the denial of Federal Foster Care benefits to otherwise eligible minor wards of the state solely because they are placed

as foster children in the homes of relatives, violates the Social Security Act §§401, 408, and therefore the Supremacy Clause of the United States Constitution.

This case was previously before this Court on appeal by the children from a ruling of a three-judge court that the Illinois policy at issue did not violate the equal protection clause of the United States Constitution, *Youakim* v. *Miller,* 374 F. Supp. 1204 (N.D.Ill. 1974) (Jurisdictional Statement, Appendix E). On March 21, 1976, this Court issued a *per curiam* opinion, remanding this case to the District Court for consideration of the issue of conflict between the Illinois law and the Social Security Act which had not been directly presented to or addressed by the three-judge court below. *Youakim* v. *Miller,* 425 U.S. 231 (1976). In entering the remand order, the Court noted that the Department of Health, Education, and Welfare ("HEW"), the federal agency charged with administering the Federal Foster Care program, had issued a Program Instruction (Appendix A hereto) which fully supported the foster children's claim that the Illinois scheme violated the Social Security Act, *Id.* at 235, and that such an interpretation was "a substantial factor to be considered in construing the Statute." It also noted that the Solicitor General had filed a statement with this Court that the Illinois foster care program was inconsistent with the Social Security Act, *Id.* (Appendix B).

On remand, a single judge district court certified a plaintiff class of foster children in related foster homes and ruled that:

> 1. *Ill.Rev.Stat.,* ch. 23 §§2212.05, 2212.17 and implementing policies and procedures of the Illinois Department of Children and Family Services ("DCFS") are contrary to 42 U.S.C. §§601 and 608, implementing federal regulations, and Department of Health, Educa-

tion, and Welfare Program Instruction APA-PI-75-9, and are therefore invalid under the Supremacy Clause of the United States Constitution, Article VI, cl. 2 insofar as they exclude from eligibility, or deny full Aid to Families with Dependent Children—Foster Care payments (hereinafter, "full AFDC-F' payments") under 42 U.S.C. §608, or ancillary public assistance benefits and services, . . . to . . . .

> (a) dependent foster children otherwise eligible for these full AFDC-F payments and ancillary benefits, because such children live in foster family homes . . . maintained by foster parents or other persons . . . who are related to them; . . . .

A unanimous Court of Appeals affirmed the judgment of the district court, 562 F.2d 483 (7th Cir. 1977).

ARGUMENT

THE PLAIN MEANING OF THE STATUTE AND UNANIMOUS JUDICIAL CONSTRUCTION THEREOF SUPPORT THE RULING BELOW

The Social Security Act ("Act") specifies the eligibility criteria for participation in the categorical public assistance programs administered by the states. The states are obliged, under Section 402(a)(10) of the Act, 42 U.S.C. §602(a)(10) (Supp. V 1975), as a condition of the receipt of federal funds for their programs, to provide " 'that aid to families with dependent children shall be furnished with reasonable promptness to *all eligible* individuals,' " *Townsend* v. *Swank,* 404 U.S. 283, 285 (1971). State eligibility criteria which are inconsistent with, or additional to, those of the Social Security Act violate the Act, and thus the Supremacy Clause of the United States Constitution. *Philbrook* v. *Glodgett,* 421 U.S. 707 (1975); *King* v. *Smith,* 392 U.S. 309 (1968). In short, "once the federal standard of eligibility is defined, a participating state may not deny aid to persons who come within it in the absence of a clear indication that Congress meant the coverage to be optional." *Burns* v. *Alcala,* 420 U.S. 575, 580 (1975).

Every court which has directly considered the issue presented here has ruled, on the basis of the specific provisions, history and purpose of the Foster Care sections of the Social Security Act, that the exclusion of related foster family homes from eligibility for Federal Foster Care benefits violates the Act. *Youakim* v. *Miller,* 431 F. Supp. 40 (N.D.Ill. 1976), *aff'd.* 562 F.2d 483 (7th Cir. 1977); *Jones* v. *Davis,* Civ. 76-805 (D.Or. February 1, 1977),

appeal docketed, No. 77-2254 (9th Cir. June 7, 1977); *Clampett* v. *Madigan,* Pov. L. Rep. (CCH) ¶17979 (D.S.D. May 24, 1973); cf. *Jackson* v. *Ohio Department of Public Aid,* No. 72-182 (N.D.Oh. April, 1972) (Unreported cases appear in Appendix C hereto). The Department of Health, Education, and Welfare ("HEW"), the agency charged with the administration of the Federal Foster Care program, and the Solicitor General of the United States have concurred in that interpretation of the Act. (Appendices A and B.) There is no contrary interpretation from any court or federal administrative agency.

Section 408(a) of the Act defines the term "dependent child" for purposes of Foster Care Eligibility. A dependent foster child is a child

> (1) who has been removed from the home of a relative, as the result of a judicial determination that continuation therein would be contrary to the welfare of the child, 42 U.S.C. §608(a)(1); and
>
> (2) whose placement and care are the responsibility of the agency administering the AFDC program, or, as in Illinois, an agency (DCFS) responsible to such an agency, 42 U.S.C. §608(a)(2); and
>
> (3) who has been placed in a foster family home or child care institution as a result of such judicial determination, 42 U.S.C. §608(a)(3); and
>
> (4) who was eligible for AFDC benefits at the time the court proceedings leading to his removal from the home of a relative were initiated, or within six months prior thereto, 42 U.S.C. §608(a)(4). See also 45 C.F.R. 233.110(a)(1) (1976).

Plaintiffs and class members here meet this statutory definition of eligibility: (1) they have been removed from their parents' home by court findings of neglect, etc.;

(2) they are under the legal custody and care of the state agency responsible for such children, which is responsible to the welfare department for running the federal foster care program; (3) they have been placed in foster family homes; and (4) they were eligible for regular AFDC in the parental home from which they were removed. Thus they would be eligible under the federal statutory definition in Section 408(a) except that Illinois has engrafted onto Section 408(a)(3) an additional eligibility requirement: under Illinois law the children must be "placed in a foster family home" maintained by a non-relative. But this is not only an unjustifiable accretion to Section 408(a)(3), it directly contravenes the definition of foster family home which immediately follows in Section 408(b).[1]

Section 408(b) defines the term "AFDC" for purposes of Federal Foster Care eligibility. And that provision specifically defines such benefits as money payments made to otherwise eligible foster children living with "any individual":

> The term 'aid to families with dependent children' shall . . . include also foster care in behalf of a child described in paragraph (a) of this section—(1) in the foster family home of any individual.

Thus an otherwise eligible foster child as defined in Section 408(a) may live in the home of "any individual." The

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[1] The number of children meeting these requirements and who are members of the class is relatively small. Approximately 1700 children were excluded from eligibility because of placement in the homes of related foster parents in Illinois in fiscal 1977. (R. Doc. No. 45, Affidavit of Chief of Information Systems, DCFS) In March of 1977 over 559,000 children were receiving AFDC in Illinois. Office of Research and Statistics, HEW, *Public Assistance Statistics,* March, 1977.

State officials never explain away the import of the phrase "any individual" as used in Section 408(b).

In *Shea* v. *Vialpando,* 416 U.S. 251 (1974), this Court recently had occasion to consider the meaning of the word "any" in another provision of the Social Security Act:

> By its terms, §402(a)(7) requires the consideration of 'any' reasonable work expenses in determining eligibility for AFDC assistance. In light of the evolution of the statute and the normal meaning of the term 'any' we read this language as a congressional directive that no limitation, apart from that of reasonableness, may be placed upon the recognition of expenses attributable to the earning of income.

416 U.S. at 260.

To support their reading of §408 of the Act, the State officials must read "any individual" in §408(b) as "any individual (except one related to the foster child)." This reading does not square with the "normal meaning" of the word "any," *Id.*

As the Court of Appeals noted, 562 F.2d at 487 (Jurisdictional Statement, App. B) Section 408 also defines the term "foster family home":

> For purposes of this section, the term "foster family home" means a foster family home for children which is licensed by the State in which it is situated or has been approved, by the agency of such State responsible for licensing homes of this type, as meeting the standards established for such licensing . . .

The Court of Appeals held, *Id.* at 488, that the Home Placement Agreement and Illinois' Family Placement Manual pursuant to which it was executed, indicated that the Youakim home must meet and had met standards for foster care placement. Thus the failure of the Youakim home to be "officially designated a foster care facility" stemmed entirely from the very state provision "which

directly conflicts with the federal statutory definition" of "foster family home."[2] *Id.*

Both the district Court and the Court of Appeals concluded that the "plain words and meaning" of these provisions of Section 408 mandate Federal Foster Care eligibility for the plaintiff class of foster children. 562 F.2d at 486, 431 F. Supp. at 43 (Jurisdictional Statement, App. B).[3] The State officials are reduced to arguing simply that

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[2] The state continues here (pp. 16-17) to press its totally circular argument regarding the non-licensing of the Youakims' home. As the Court of Appeals correctly noted:

> We do not understand the DCFS to be contending that its staff workers ignored the criteria established in the Placement Manual. That the home of the Youakims was not 'officially designated as a foster care facility,' *see* note 5 *supra,* stems entirely from the want of power under Illinois law to make such an official designation. The very statutory provision struck down in the lower court's judgment order defines a 'foster family home' as a facility for child care in the residences of families who receive children *unrelated* to them. Ill. Rev. Stat. 1975. ch. 23 §2212.17. The DCFS can hardly rely upon a definition of 'foster family home' which directly conflicts with the federal statutory definition as a way of upsetting the district court's determination of a violation of the Supremacy Clause. Nor can the DCFS procedure of striking out the word 'foster' wherever it appears in a Foster Home Placement Agreement be determinative of the Youakims' right to foster care benefits. (footnote omitted)

562 F.2d at 488.

[3] Indeed at oral argument before the Court of Appeals, the DFCS admitted that "[i]t's very true that under the [federal] foster care program the relatives' home is not excluded from coverage under this program—It's not literally excluded." During oral argument before the original three-judge court, the DCFS similarly admitted that "[t]here is nothing in Federal or State statutes which bars payment to foster parents of related children, that plaintiffs have repeatedly stressed." 562 F. 486 n. 4.

Section 408 does not "*expressly* include or exclude from foster care assistance" otherwise eligible foster children who are placed with relatives. (Jurisdictional Statement, p. 11)[4] (emphasis added). But once Congress specified the eligibility criteria for the program, it could have no reason *explicitly* to include a subgroup (relatives) specified by one of the innumerable characteristics (relatedness), wholly irrelevant to the chosen eligibility criteria. Under a canon of statutory interpretation implicit in appellants' argument, no individual who met all the eligibility criteria established by a statute would ever be "clearly" eligible for benefits under that statute, since it would always be possible to identify an additional characteristic of the individual about which the statute is silent, and claim that the statute is therefore "ambiguous" as to his eligibility. (Jurisdictional Statement, p. 11.)

In sum, the eligibility definitions in 42 U.S.C. §608 establish that otherwise eligible foster children are eligible for Federal Foster Care benefits upon placement in a foster home maintained by any individual, related or not. Moreover, every court which has addressed the question agrees.

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[4] They also advance the argument that this Court's decision in *Burns* v. *Alcala*, 420 U.S. 575 (1975), supports their reading of Section 408. (Jurisdictional Statement, p. 13). But this Court, one year after the decision in *Burns*, vacated the original three-judge court decision in this case partly on the ground that HEW's contrary position suggested that the State officials' position would be in violation of the Act. That fact hardly suggests that this Court had previously considered the question in this case in *Burns*, much less decided it. The excerpt the State officials cite from *Burns* simply characterizes the Foster Care Program in respects wholly irrelevant to this case.

THE CONSISTENT INTERPRETATION OF THE STATUTE BY THE DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE, IN WHICH THE SOLICITOR GENERAL CONCURS, SUPPORTS THE RULING BELOW

HEW's interpretation of the Federal Foster Care program statute, and its own regulations, wholly support the foster children's position here. Program Instruction APA-PI-75-9 (October 24, 1974) provides in pertinent part:

> This program instruction is issued to resolve the problem of some states not licensing or approving homes of nonlegally liable relatives as foster care homes even though suitable foster care could be provided in the homes and payments made at the foster care rate when children are placed with relatives who meet all conditions of eligibility for AFDC-FC.
>
> • • •
>
> Under 45 C.F.R. §233.110(a)(1) states must provide for aid in the form of foster care for each otherwise eligible child as specified in the Act and in 233.110(b) . . . *These provisions apply regardless of whether the licensed or approved foster family home in which a child is placed is operated by a relative (with no legal responsibility to support the child).*
>
> When a child has been removed from his home by judicial determination and is placed in foster care under the various conditions specified in Section 408 of the Social Security Act and 45 C.F.R. §233.110, the foster care rate of payment prevails *regardless of whether or not the foster home is operated by a relative.* . . . (Emphasis added.)

The Program Instruction was issued for the purpose of bringing some recalcitrant states into compliance with long-standing HEW policy incorporated in 45 C.F.R. §233.110(a)

and (b) (1971), codifying HEW Handbook of Public Assistance Administration, pt. IV, §3452(2) (1963).[5]

It was in light of HEW's interpretation of Section 408 of the Act that this Court previously remanded this case, stating that it was "a substantial factor to be considered in construing the statute." 425 U.S. at 235. This was simply an application of the "venerable principle that the construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong. . . ." *Red Lion Broadcasting Co.* v. *F.C.C.*, 395 U.S. 367, 381 (1969). See also *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965) (Secretary of Interior's interpretation of law he is charged with executing entitled to "great deference," and Court need not find that it is only reasonable interpretation to sustain it.)

The case was also remanded in light of the Solicitor General's statement agreeing with the foster children and HEW's interpretation of the Act. In his Amicus Curiae brief the Solicitor stated:

[5] The state officials assert that "HEW" adopted a contrary position—one supporting the state officials—in 1971. (Jurisdictional Statement, p. 20.) In fact, the state reference to the HEW position is to an opinion of one local HEW employee in Chicago, as expressed in a letter to an Illinois Department of Public Aid employee. There is nothing in that letter, or anywhere in the record, to indicate that that opinion—unsupported by the language, purpose, or history of the Act or previous HEW policy—represented a considered HEW policy applied to all state agencies, rather than the ill-considered judgment of a single local HEW official. It does not detract from the force of the unequivocal longstanding *agency* interpretation of the Act, as expressed in official HEW regulations and program instructions. The context of the local official's letter, the content of the letter or other inquiry to which it was a response, and the reasons the state made the inquiry, have never been presented by the state in this case.

> Appellants [the children] concededly meet all of [the eligibility] conditions [found in §408] and therefore qualify for AFDC-FC. The additional requirement imposed by the State of Illinois . . . is contrary to the decisions of this Court which have prohibited the states from narrowing specific federal eligibility criteria without congressional authorization [citations omitted].
>
> The denial of foster-care benefits to children living with relatives is likely to make relatives unwilling to accept the children and lead to the placement of children in foster homes of non-relatives. This result would be inconsistent with the policy stated in 42 U.S.C. §601 that the AFDC program is aimed at 'encouraging the care of dependent children in their own home or in the homes of relatives.' (Appendix B.)

While the state officials, of course, dispute HEW's interpretation of the Act, as expressed in its regulations, (Jurisdictional Statement, pp. 20-21) their arguments ironically reinforce the proposition that HEW's construction of the Act is entitled to substantial weight here. Thus, the state officials assert that Section 408 is "ambiguous" (Jurisdictional Statement, p. 11) and that it is both "necessary and appropriate" to construe the Federal Foster Care statute in light of the entire "federal welfare scheme . . ." *Id.* But the "sound principle of according deference to administrative practice" is applicable precisely "where the relevant statutory language is unclear or susceptible of differing interpretations," *Shea* v. *Vialpando*, 416 U.S. 251, 262 n.11 (1974). And this Court has consistently deferred to "the attempt of an experienced agency to harmonize . . . [a particular statutory provision] with the basic structure of the program it administers." *Rosado* v. *Wyman*, 397 U.S. 397, 415 (1970); cf. *Zuber* v. *Allen*, 396 U.S. 168, 192 (1969). See *Albemarle Paper Company* v. *Moody*, 422 U.S. 405, 431 (1975) (Administrative guidelines interpreting the relevant statute are entitled to "great deference" even though not formal "regulations.")

CONSTRUING SECTION 408 IN LIGHT OF THE PURPOSES OF THE FEDERAL FOSTER CARE PROGRAM SUPPORTS THE RULING BELOW

Bereft of support from the statute itself, from court decisions, from HEW, or from the Solicitor General, the State officials have "constructed an elaborate . . . argument, regarding an implied legislative intent to exclude relatives from the denotation of the word 'foster'." *Youakim* v. *Miller*, 562 F.2d 483, 486 (7th Cir. 1977). *See* Jurisdictional Statement, pp. 12 ff. They assert first that the plaintiff foster children were, prior to the enactment of the Federal Foster Care program, eligible for the regular Aid to Families with Dependent Children program. (Jurisdictional Statement, p. 12.) In this context, their argument is basically that "the more recently enacted Section 408 foster care benefits could only have been intended to reach a group of children not previously entitled to federal welfare assistance—that is, needy dependent children who are placed in unrelated homes." *Id.*

Stripped of its trappings, the State officials' argument rests upon the remarkable proposition that having once defined categorical welfare eligibility for a particular class of children, Congress cannot formulate an intent to redefine eligibility to meet the greater common needs of a group containing both previously covered and uncovered children.[6] But Congress obviously can identify, and has here identified, a particular problem, common to both a subgroup of existing recipients and a sub-group of non-recipients, and can formulate a new program for which both subgroups are eligible on the basis of shared characteristics

[6] Accordingly, the State officials suggest that the foster children's position is that they are eligible for both regular AFDC benefits (under 42 U.S.C. §606) and AFDC-F benefits (under 42 U.S.C. §608). Jurisdictional Statement, p. 17. As noted in the text, there is not overlapping eligibility; rather, Congress has redefined the foster children's eligibility to make them eligible for the Federal Foster Care program.

set forth in detail in the statute. Cf. *Philbrook* v. *Glodgett*, 421 U.S. 707 (1975). (Enactment of AFDC-Unemployed Father Program). In such a situation, as here, Congress can identify the need and those children sharing it, shape benefits to meet that need, and mandate special services.

The Federal Foster Care program provides higher benefits and more intensive services than the regular AFDC program.[7] These higher benefits and services are responsive

[7] Foster children who, by definition, have been determined neglected, are to be "assure[d]" receipt of proper care by development of an individual social services plan. §408(f). Moreover, foster children must be placed in homes meeting nationally recognized licensing standards, consistent with the provision of a home environment better suited to their needs. §408(f), 45 C.F.R. 228.12. Also, services must be provided to the home from which a foster child is removed to facilitate his permanent return to that home, or, failing that, permanent placement with other family members. §408(f). None of these intensive services are available—or even appropriate—for children in the regular AFDC program. Further, Congress has helped insure that states would be able to pay higher foster care rates by increasing the level for federal matching shares for benefit payments up to $100/month for children receiving AFDC-FC benefits. 42 U.S.C. §603(a)(1)(B) (1970). And all states' foster care benefits are higher than regular AFDC benefits. See HEW Publication No. (SRS) 76-03200, NCSS Report D-2, *Aid to Families with Dependent Children, Standards for Basic Needs* (July, 1975), and HEW Publication No. (SRS) 77-03100, NCSS Report A-2, Public Assistance Statistics (May, 1976). The State officials never discuss the significance of the additional benefits and intensive services provided under the program, except to argue that the statute's provision of certain services under §408(f) somehow supports their position. (Jurisdictional Statement, 18). The Court of Appeals, of course, rejected this argument, 562 F.2d at 489-90, which the State officials acknowledge by stating "[t]he Court of Appeals] could only state that three other interpretations [of §408(f)] are plausible." (Jurisdictional Statement, 18). In fact, the Court of Appeals ruled that: *"Only* three readings of the sub-section are plausible," *Id.* at 489 (1977) (emphasis added) and that, on the reading of §408(f) *most favorable* to the State officials, the sub-section was wholly consistent with the childrens' interpretation of the statute, *Id.* at 490.

to a deprivation which foster children living with related foster parents have suffered no less than foster children living with unrelated foster parents. All foster children, *members of the plaintiff class included,* have been neglected or otherwise deprived of adequate care in their homes, to a degree necessitating removal from such homes because of a judicial determination that remaining there would be contrary to their welfare. Later placement of such children with relatives (or with non-relatives) does not change this fact about the children or their poor home environment. In this context, it is illogical to argue, as the State officials do, that Congress intended that they should be excluded from the Federal Foster Care Program. Such children, members of the plaintiff class, stand similarly situated to children living in unrelated foster homes with respect to the deprivation to which they have been subject and their need for additional benefits and intensive services of the Foster Care program. To have intended to exclude them, Congress must have intended not to meet the special needs of foster children placed with relatives. But Congress never limited or showed an intent to bifurcate the class of children traumatized by their mistreatment in and removal from their parental homes. On the contrary, the legislative history surrounding enactment of the foster care provisions reflects Congress' concern with the unsuitability of the homes in which neglected or abused dependent children were residing, and the commonality of the needs of children removed:

> Section 2 [establishing the Federal Foster Care Program] would allow the states the option of bringing needy dependent children under the federally aided program where a court of competent jurisdiction finds that the children are not receiving proper care and protection in their own homes and gives responsibility to the State agency to place them in foster family homes.
>
> • • •

> . . . there are some home environments that are clearly contrary to the best interests of these children . . . because of the immoral or negligent behavior of the parent.

See S. Rep. No. 165 87th Cong. 1st Sess. 6, reprinted in [1961] U.S. Cong. and Ad. News, 1721. And the special needs of foster children—including, by definition, the foster children here—and the increased cost of meeting those needs, were the two reasons Congress increased federal sharing for the foster care program in 1967.

> Your Committee believes that some children now receiving AFDC would be better off in foster homes or institutions than they are in their own homes. *This situation arises because of the poor home environment for the child upbringing in homes with low standards,* including multiple instances of illegitimacy. *Foster care is relatively costly,* and States have reported that they cannot finance it without some additional federal help . . .
>
> Under the committee bill, Federal funds will be available on a more liberal basis than for the basic program *out of a recognition that foster family care is more costly than care in the child's home.* Effective July 1, 1969, State plans would have to provide for foster care under these terms. . . . Your committee believes that these liberalizations will be of material assistance to States and localities and will facilitate plans being developed for children *based on the need of the child* rather than the fiscal condition of the local government.

House Report No. 544, 90th Cong. 1st Sess. (1967), pp. 100 101 (emphasis added).

Thus, the "need of the [foster] child" was central to the enactment of the foster care program, and to increased federal funding for the program. The State officials' argument simply ignores this fact, and that Congress never

differentiated the needs of the plaintiff class of foster children from the class of foster children which Illinois does cover.

In enacting the Federal Foster Care Program, Congress was also concerned with the shortage of qualified foster parents. See S. Rep. 165 87th Cong. 1st Sess, 6, reprinted in [1961] U.S. Cong. and Admin. News, 1721 (citing a lag in "development of the most suitable care for children who have to be cared for outside of their own home," as one reason for establishment of the Program). See also Hearings on H.R. 10032 before House Committee on Ways and Means, 87th Cong, 2nd Sess. 295 (Testimony of HEW Secretary Ribicoff). Accordingly, as the practical effect of the State officials' reading of Section 408 is to exclude from consideration as eligible foster parents the whole class of non-legally responsible relatives of the foster children, the effect also is to reject Congress' workable solution to the problem of attracting qualified foster parents.

The State officials, of course, never suggest that relatives, as a class, can not be qualified foster parents. But their exclusion of relatives as foster parents reflects another important way in which the Illinois policy at issue frustrates Congress' intent. That intent, as expressed in 42 U.S.C. §601 (1970) is incorporated in a stated preference for care for all dependent children "in their own homes or the homes of relatives," 42 U.S.C. §601 (1970). All of Title IV is the product of Congress' intent to "help children through the family structure" and a "federal statutory concern for preserving children in a family environment." *Dandridge* v. *Williams*, 397 U.S. 471, 479 (1970). To construe Section 408 to exclude foster children placed by DCFS with related foster parents from Federal Foster Care eligibility therefore attributes to Congress an intent contrary to its specific intent as expressed throughout the Act. Thus

the State officials' reading of Section 408 would have it that Congress enacted a program (the Federal Foster Care program) under which those children perhaps most in need of the special help provided by the program would then be denied its benefits, precisely because they lived with members of their family.

The way in which the Illinois policy at issue here frustrates Congress' intent in this respect is nowhere better illustrated than by the facts of this case. The Illinois policy struck down by the district court had dictated that Larry Youakim remain in an orphanage, and Sherry Youakim with unrelated foster parents—apart fom each other and their brothers and sisters.

CONCLUSION

The District Court and the Court of Appeals herein have concurred in the interpretation of the Social Security Act of the Department of Health, Education, and Welfare and of the Solicitor General of the United States. Moreover, Congressional intent expressed in the legislative history supports this interpretation. In circumstances where this Court has been faced with such agreement between HEW's construction of the Social Security Act and judicial construction of the Act (even in the absence of the unanimous concurrence, which exists here, of all courts considering an issue) summary affirmance of the lower court's ruling has been deemed appropriate. *Maher* v. *Buckner*, 98 S.Ct. 290 (1977) *aff'g mem.* 424 F. Supp. 366, 373 n. 12 (D. Conn. 1976); *Doe* v. *Flowers*, 416 U.S. 922 (1974) *aff'g mem.* 364 F. Supp. 953 (N.D. W.Va. 1973); *Carleson* v. *Taylor*, 404 U.S. 980, *aff'g mem. Taylor* v. *Martin*, 330 F. Supp. 85 (N.D. Cal. 1971); *Swank* v. *Rodriguez*, 403 U.S. 901 (1971) *aff'g mem.* 318 F. Supp. 289 (N.D. Ill. 1970); *Wyman* v. *Boddie*, 402 U.S. 991 (1971) *aff'g mem.* 434 F.2d 1207, 1211

(2nd Cir. 1970); *Shapiro* v. *Solman,* 396 U.S. 5, *aff'g mem.* 300 F.Supp. 409 (D. Conn. 1969). Appellees respectfully submit that the appellants present no substantial question for the decision of this Court and the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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APPENDIX

APPENDIX A

DEPARTMENT OF HEALTH, EDUCATION,
AND WELFARE
SOCIAL AID ADMINISTRATION SERVICE
WASHINGTON, D.C. 20201

PROGRAM INSTRUCTION
APA-PI-75-9
October 25, 1974

TO: STATE AGENCIES ADMINISTERING APPROVED PUBLIC ASSISTANCE PLANS

SUBJECT: AFDC Foster Care

COMMENT: This program instruction is issued to resolve the problem of some States not licensing or approving the homes of non-legally liable relatives as foster care homes even though suitable foster care could be provided in the homes and payments made at the foster care rate when children are placed with relatives who meet all conditions of eligibility for AFDC-FC.

There have been several U.S. District Court decisions which have held that States may not refuse to provide the foster care rate to a foster home because it is operated by relatives who have no legal responsibility for support and care of the child.

In addition, the U.S. Supreme Court in the case of *Ramos* v. *Montgomery*, January 18, 1971, upheld making a higher payment for foster care than was provided under a State's standard for AFDC payments.

Under 45 CFR 233.110(a)(1), States must provide for aid in the form of foster care for each otherwise eligible child as specified in the Act and in 233.110(b). Federal financial participation is available for children who are placed in a foster home or non-profit private child-care institutions licensed or approved by the agency which is responsible for licensing or approval of such facilities in the State. These provisions apply regardless of whether the licensed or approved foster family home in which a child is placed is operated by a relative (with no legal responsibility to support the child).

When a child has been removed from his home by judicial determination and is placed in foster care under the various conditions specified in Section 408 of the Social Security Act and 45 CFR 233.110, the foster care rate of payment prevails regardless of whether or not the foster home is operated by a relative. A non-legally liable relative has no financial responsibility towards the child placed with him and the income and resources of such a relative are not factors in determining entitlement to a foster care payment. It must be noted, too, that the 1967 amendments to the Social Security Act liberalized Federal financial participation in the cost of foster care, recognizing foster

family care is more costly than care in the child's own home.

INQUIRIES TO: SRS Regional Commissioners.

Commissioner
Assistance Payments Administration

§233.110 *AFDC foster care.*

(a) *State plan requirements.* A State plan under title IV-A of the Social Security Act must:

(1) Provide that aid will be given in the form of foster care for each otherwise eligible child:

(i) Who was removed after April 30, 1961, from the home of a relative specified in the AFDC plan, as a result of a judicial determination that continuance in the home of the relative would be contrary to his welfare, for any reason, and who has been placed in foster care as a result of such determination; and

(ii) (*a*) Who, in or for the month in which that court action was initiated, was receiving AFDC, or would have received AFDC if application had been made, or

(*b*) Who lived with a relative specified in the AFDC plan within 6 months prior to the month in which that court action was initiated, and who would have received AFDC in or for such month if in such month he had been living with (and removed from the home of) such a relative and application had been made for him; and

(iii) Whose placement and care are the responsibility of the State agency administering or supervising the administration of the AFDC plan, or, if the State so elects, are the responsibility of any other public agency, or type or types of public agencies specified in the plan, with whom the State agency has a currently effective agreement that provides for development of a plan satisfactory to the State agency for AFDC-FC children in accordance with subparagraph (2) of this paragraph and that contains

other provisions necessary to achieve the objectives of the State's AFDC plan.

(2) Provide for development of a plan for each child described in subparagraph (1) of this paragraph, so that:

(i) He will be placed in a foster family home or a child care institution in accordance with his needs;

(ii) His need for and the appropriateness of his care and services in such placement will be reviewed not less frequently than every 6 months;

(iii) Services will be provided to improve the conditions in the home from which he was removed or to make possible his placement in the home of another relative under the State's AFDC plan. (See § 220.19 of this chapter.)

(3) Provide that maximum use will be made of the services of employees of the State public welfare agency responsible for the plan for child-welfare services under title IV.-B of the Act or of any local agency participating in the administration of such plan.

(4) Specify:

(i) In what types of child care institutions (private nonprofit, or public, or both), in addition to foster family homes, placement will be made; and

(ii) Whether payments will be made to foster homes and institutions only or also to other agencies.

(5) Provide that there will be specific criteria for determining the amount of payment for foster care in foster family homes and in child care institutions. In establishing rates of payment to institutions, only those items included for care in foster family homes will be included, and overhead costs of the institution will be excluded.

Under the requirements of this paragraph, provision must be made for both foster family care and institutional care in accordance with the individual child's needs; public institutions may be used, without Federal financial participation, to discharge the institutional obligation in whole or in

part; and the use of institutions outside the State will also meet the requirement for the provision of institutional care.

(b) *Federal financial participation.* (1) Federal financial participation is available, effective January 1, 1968, in AFDC-FC payments not to exceed an average of $100 per month per recipient, made on behalf of children as specified in section 408 of the Social Security Act, who are included in the approved State AFDC plan and who are placed in a foster family home, or nonprofit private child-care institution, licensed or approved by the agency which is responsible for licensing or approval of such facilities in the State where it is situated. The maximum of $100 average per month per recipient may be disregarded when the State claims Federal funds under the provisions of section 1118 of the Act.

(2) Federal financial participation is available in AFDC-FC payments made to an individual providing care in a foster family home, to a private nonprofit child care institution, or to a cooperating public or nonprofit private child placement or child-care agency.

HEW Handbook of Public Assistance Administration, pt. IV, §3452(2) (7/24/63)

Child-Recipient Eligible for Foster Care

To be eligible for assistance as foster care with Federal financial participation under Title IV(a) the child must have been receiving AFDC (money payments and/or medical care) in his own home or in the home of one of the specified relatives who was responsible for his care and control; (b) the child must continue to meet the eligibility requirement of need, deprivation of parental support or care, and age; (c) the child must have received assistance as aid to families with dependent children in or for the month in which court proceedings resulting in the child's removal were instituted; (d) the removal of such child pursuant to the court determination must have been after April 30, 1961.

Handbook, pt. IV, §3452(2) (7/24/63).

APPENDIX B

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1974

No. 73-6935

MARCEL YOUAKIM and LINDA YOUAKIM, ET AL.,
APPELLANTS

v.

JEROME MILLER

On Appeal From The United States District Court
For The Northern District Of Illinois

MEMORANDUM FOR THE UNITED STATES AS *AMICUS CURIAE*

This memorandum is submitted in response to this Court's order of October 15, 1974, inviting the Solicitor General to present the views of the United States.

STATEMENT

The State of Illinois has a policy whereby it makes a substantial foster care (AFDC-FC) payment pursuant to the federal Aid to Families with Dependent Children (AFDC) program when children are placed in a foster

home with persons who are not related, pursuant to a judicial determination that the children's original home is unsuitable for them. If, however, the persons providing the foster care in such circumstances are related to the children, Illinois denies them foster care payments, unless they can show a need therefor. The foster family may qualify for AFDC payments, which in Illinois are less than the AFDC-FC payments.

Appellants in this case are foster parents caring for children related to them, and the children themselves. They brought a class suit in the United States District Court for the Northern District of Illinois, contending that the Illinois practice of providing higher payments when the foster parents are unrelated to the children violates the Social Security Act and the Equal Protection Clause. A three-judge district court rejected these contentions and dismissed the suit (J.S. App. A).

ARGUMENT

We submit that the Illinois policy of denying foster care AFDC benefits for children living with relatives is invalid because it conflicts with specific criteria for eligibility set forth in the Social Security Act; and that the validity of this practice is a substantial question in the administration of the Social Security Act which warrants plenary review by this Court.

1. In order to qualify for AFDC benefits, a child must be a "dependent child" as defined in 42 U.S.C. 606(a). Under that definition, a child is dependent if it (1) has been deprived of parental support for specified reasons, (2) is living with a relative as defined in the section, and (3) is

under 18 (or, in certain circumstances 21) years of age.[1] The AFDC foster care program is provided under 42 U.S.C. 608, which expanded the definition of "dependent child" to include certain children who, even though not living with relatives, live in foster homes as a result of a judicial determination that they should be removed from their regular homes.[2] A child is eligible for AFDC-FC if

[1] 42 U.S.C. 606(a) provides:

When used in this part—

(a) The term "dependent child" means a needy child (1) who has been deprived of parental support or care by reason of the death, continued absence from the home, or physical or mental incapacity of a parent, and who is living with his father, mother, grandfather, grandmother, brother, sister, stepfather, stepmother, stepbrother, stepsister, uncle, aunt, first cousin, nephew, or niece, in a place of residence maintained by one or more of such relatives as his or their own home, and (2) who is (A) under the age of eighteen, or (B) under the age of twenty-one and (as determined by the State in accordance with standards prescribed by the Secretary) a student regularly attending a school, college, or university, or regularly attending a course of vocation or technical training designed to fit him for gainful employment.

[2] 42 U.S.C. 608(a) provides:

Effective for the period beginning May 1, 1961—

(a) the term "dependent child" shall, notwithstanding section 606(a) of this title, also include a child (1) who would meet the requirements of such section 606(a) or of section 607 of this title except for his removal after April 30, 1961, from the home of a relative (specified in such section 606(a)) as a result of a judicial determination to the effect that continuation therein would be contrary to the welfare of such child, (2) whose placement and care are the responsibility of (A) the

(footnote continued)

it (1) is a "dependent child" as defined in Section 608(a); (2) lives in a "foster family home" or a "child-care institution" as a result of a judicial determination that the child's home is not suitable for him (Section 608(f)); and (3) meets other conditions of Section 608, not in issue here.

Appellants concededly meet all of these conditions, and therefore qualify for AFDC-FC. The additional requirement imposed by the State of Illinois that children are entitled to AFDC-FC only if the foster home in which they are living is maintained by non-relatives is contrary to the decisions of this Court which have prohibited the states from narrowing specific federal eligibility criteria without

(footnote continued)

State or local agency administering the State plan approved under section 602 of this title, or (B) any other public agency with whom the State agency administering or supervising the administration of such State plan has made an agreement which is still in effect and which includes provision for assuring development of a plan, satisfactory to such State agency, for such child as provided in paragraph (f)(1) and such other provisions as may be necessary to assure accomplishment of the objectives of the State plan approved under section 602 of this title, (3) who has been placed in a foster family home or child-care institution as a result of such determination, and (4) who (A) received aid under such other plan in or for the month in which court proceedings leading to such determination were initiated, or (B)(i) would have received such aid in or for such month if application had been made therefor, or (ii) in the case of a child who had been living with a relative specified in section 606(a) of this title within 6 months prior to the month in which such proceedings were initiated, would have received such aid in or for such month if in such month he had been living with (and removed from the home of) such a relative and application had been made therefore.

congressional authorization. *Townsend* v. *Swank,* 404 U.S. 282, 286; *Carlson* v. *Remillard,* 406 U.S. 598, 601; *King* v. *Smith,* 392 U.S. 309, 333.[3]

Appellees argue (Motion to Dismiss or Affirm, p. 15) that because the Social Security Act "indicates that children ought to be placed, when their return to their natural home is rendered impossible, in the home of a relative, and only thereafter in the home of a stranger * * * the law considers relatives of a child on a nearly equal basis with natural parents." From this they conclude that the state may treat children in foster homes of relatives as if they were still living with their parents, and therefore deny them foster-care payments. The argument is a *non sequitur.*

As already noted, the only qualification for foster-care benefits is that the child be "dependent" and that it be living in a foster home or a child-care institution as the result of a judicial determination that its own home is unsuitable. Those conditions were satisfied here, and the child is therefore entitled to foster-care benefits.

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[3] There have been several cases in which the state has been permitted to impose additional requirements as conditions of eligibility for AFDC. *Snell* v. *Wyman,* 393 U.S. 323, affirming 281 F. Supp. 856 (S.D. N.Y.); *Wyman* v. *James,* 400 U.S. 309; *Charleston* v. *Wohlgemuth,* 405 U.S. 970, affirming 332 F. Supp. 1175 (E.D. Pa.); *New York State Department of Social Services* v. *Dublino,* 413 U.S. 405. The requirements upheld in those cases, however, were designed to further the purposes of the Social Security Act, such as seeking employment, permitting a home visit by social workers, or agreeing to reimburse the state for assistance received if funds therefor become available. Here, on the other hand, the Illinois system excludes from benefits a class of children who meet the statutory qualifications and, as shown *infra,* (p. 5), the disqualifying condition of living with a relative is opposed to rather than in furtherance of the design of the Social Security Act.

Appellees' argument, rather than supporting their conclusion, points in the opposite direction. The denial of foster-care benefits to children living with relatives is likely to make relatives unwilling to accept the children and lead to the placement of children in foster homes of non-relatives. This result would be inconsistent with the policy stated in 42 U.S.C. 601 that the AFDC program is aimed at "encouraging the care of dependent children in their own homes or in the homes of relatives * * *." Indeed, this policy was the primary basis upon which a district court invalidated, as inconsistent with the Social Security Act, the practice of South Dakota of denying foster-care payments for children living with relatives. *Clampett* v. *Madigan,* No. CIV73-4018, decided May 24, 1973 (D. S.D.). See, also, *Jackson* v. *Ohio Department of Public Welfare,* No. C72-132, decided April 17, 1972 (N.D. Ohio).

Appellants contend that *Ramos* v. *Montgomery,* 331 F. Supp. 1197 (S.D. Cal.), affirmed, 400 U.S. 1003, controls this case. That case, however, merely held that where a child was not eligible for foster-care benefits because he did not meet the condition in Section 608 that he had been removed from his home as a result of a judicial determination, the foster parents were not entitled to receive foster-care payments. The present case, however, involves the totally different situation where the child does qualify for foster-care payments but the state denies those payments because relatives provide the foster care.

2. The question is an important one in the administration of the Act. We are informed by the Department of Health, Education and Welfare that in addition to Illinois, 13 other states currently deny full foster-care pay-

ments to foster parents caring for related children. Approximately 28 percent of AFDC recipients are living in those states. The issue thus has substantial impact, and warrants definitive resolution by this Court.

CONCLUSION

Probable jurisdiction should be noted.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

FEBRUARY 1975.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

NINA JONES, et al,

Plaintiffs,

vs.

RICHARD DAVIS, et al,

Defendants.

Civil No. 76-805

OPINION AND RECOMMENDATION

Plaintiffs Nina Jones and Robert Hollings bring this action for themselves and all others similarly situated to enjoin the enforcement of the State of Oregon's policy and practice of refusing foster care payments to children who are removed from their homes by judicial determination and placed in the homes of relatives. The defendants are Richard Davis, Director of Human Resources of the State of Oregon, J. N. Peet, Administrator of the Children's Services Division (CSD), and Leo Hegstrom, Administrator of the Public Welfare Division. Defendants are hereinafter referred to as State.

The action has been certified as a class action. The parties have signed a stipulation of facts and have submitted cross motions for summary judgment on the issue of whether the above policy and practice either violates the equal protection clause of the 14th amendment or conflicts with the Supremacy Clause of the United States

Constitution. For the following reasons, I find that the policy and practice is in conflict with the Supremacy Clause and is therefore invalid.

Robert Hollings is 14 years old. On April 7, 1976, he was removed from the home of his mother by the Circuit Court of the State of Oregon for Multnomah County. He was placed in the custody of CSD for care, placement, and supervision. That same day, CSD placed Robert with his aunt, Nina Jones. The Jones home had previously been certified as a foster home by CSD for an *unrelated* foster child. However, when Mrs. Jones requested foster care payments for Robert, she was refused on the grounds that Robert was related to her. Mrs. Jones does receive the Aid to Dependent Children payment for Robert, which amounts to $77.00 per month. Under the foster care program, she would receive $182.00 per month.[1]

Both the Aid to Dependent Children (ADC) and Aid to Dependent Children—Foster Care (FC) are subsidized by the federal government through Title IV of the Social Security Act, 42 U.S.C. § 601, *et seq.* Under the Act, ADC is available to needy children who have been deprived of parental support because of death, continued absence, or incapacity, and who are living with a specified relative. FC is available to a needy child (1) who has been removed from his home by judicial determination, (2) whose placement and care are the responsibility of the state agency (CSD), (3) who has been placed in a foster home, and (4) who was or would have been eligible for ADC within six months prior to the removal from his home. 42 U.S.C. § 608.

[1] The exact amount of money payments to children under either program is left to the discretion of the state. The state can choose to make payments in the form of foster care either more, less or the same as other Aid to Dependent Children payments.

Participation in either ADC or FC is not required of the State. However, if a state chooses to participate and establishes a "State Plan" which is not inconsistent with the federal Act or the regulations promulgated thereunder by the Department of Health, Education and Welfare, a state is eligible for federal financial participation in the costs of the program. Oregon has chosen to participate in both ADC and FC.

As noted above, Robert is currently receiving ADC payments from the State. However, under Oregon law, Robert is not eligible for the higher FC payment because Oregon defines a *foster home* as

> any home maintained by a person who has under his care in such home any child under the age of 18 *not related* to him by blood or marriage and unattended by his parents or guardian, for the purposes of providing such child with care, food and lodging . . . . ORS 418.625(2).

Thus, since Robert has been placed in the home of his aunt, he has not been placed in a "foster home" and has not met the third criterion of 42 U.S.C. § 608.

The regulations of the Department of Health, Education and Welfare define the times when a state plan may exclude groups of citizens from federal assistance programs:

> 45 C.F.R. § 233.10(a)(ii): A state may:
> (A) Provide more limited public assistance coverage than that provided by the Act *only where the Social Security Act or its legislative history authorizes more limited coverage.* . . .

The State argues that the legislative history of the Act reflects a Congressional intent to distinguish between the two types of aid on the basis of whether the recipient

lives with a relative or a non-relative. I do not agree. Originally, the only available federal aid through the Act was ADC. Then, in 1961, Congress created a new category for recipients by adding Section 608. This new program (foster care)

> would allow the States the option of bringing needy dependent children under the federally aided program *where a court of competent jurisdiction finds that the children are not receiving proper care and protection in their homes and gives the responsibility to the State agency to place them in foster family homes.*
>
> • • •
>
> The lack of financial resources for such care has hindered the development of the *most suitable care* for children who have to be cared for outside their own home. S. Rep. No. 165, 87th Cong., 1st Sess; 1961 *U.S. Code Cong. & Adm. News* 1721.

In my opinion, the distinction that Congress intended to make was whether the recipient had been removed from the home by judicial determination and placed in the custody of the state agency, not whether the agency eventually placed him in a home of a relative or non-relative. If, under all the circumstances, placement in the home of a relative would provide the *most suitable care* for the child,[2] there is no valid reason to penalize

[2] It would seem that Congress believes relatives' homes are most desirable. The purpose of Title IV is declared in 42 U.S.C. § 601 to be that of "encouraging the care of dependent children in their own homes or in the homes of relatives . . . with whom they are living to help maintain and strengthen family life. . . ." While this section was enacted prior to the amendment on foster care, it indicates an overall purpose for the entire Act, including the amendments on foster care.

the recipient by denying him the full payment for foster care. Relatives such as Mrs. Jones have no legal responsibility to contribute to the support of children such as Robert.

These conclusions are further strengthened by the language of the Act itself. 42 U.S.C. § 608(b) states:

> [T]he term "aid to families with dependent children" shall . . . include also foster care in behalf of a child described in paragraph (a) of this section—
> (1) in the foster family home of *any individual,* whether the payment therefor is made to such individual or to a public or nonprofit private child-placement or child-care agency . . . .

The State attempts to justify its position by arguing that it *does* give foster care to a child placed "in the foster home of any individual." It simply does not include relatives' homes in its definition of "foster family home." This added restriction in the definition, however, cannot be justified under either the declared purpose[3] or the language of the Act. The Act defines "foster family home" as follows:

> For purposes of this section, the term "foster family home" means a foster family home for children which is licensed by the State in which it is situated or has been approved, by the agency of such State responsible for licensing homes of this type *as meeting the standards established for such licensing* . . . . 42 U.S.C. § 608.

Surely, these standards for licensing or approval refer to fire regulations, cleanliness, balanced diet, etc. Certainly CSD would not place children in their custody in

[3] See note 2.

any home that did not meet the basic standards. But the concept of approval should be limited to aspects relating to the welfare of the child. The criterion of approval based on blood relation may well go against the best interest of the child.

Further, the interpretation of a statute by the agency charged with its enforcement is a substantial factor to be considered in construing the statute. *Youakim* v. *Miller*, 44 U.S.L.W. 4467, 4468 (March 31, 1976). On October 25, 1974, the Department of Health, Education and Welfare issued a "Program Instruction"[4] to state agencies administering approved public assistance plans. It states in pertinent part:

> Under 45 CFR 233.110(a)(1), States must provide for aid in the form of foster care for each otherwise eligible child as specified in the Act and in 233.110(b). Federal financial participation is available for children who are placed in a foster home or non-profit private child-care institutions licensed or approved by the agency which is responsible for licensing or approval of such facilities in the State. These provisions apply regardless of whether the licensed or approved foster family home in which a child is placed is operated by a relative (with no legal responsibility to support the child).
>
> When a child has been removed from his home by judicial determination and is placed in foster care under the various conditions specified in Section 408 [42 U.S.C. § 608] of the Social Security Act and 45 CFR 233.110, the foster care rate of payment prevails regardless of whether or not the foster home is operated by a relative.

[4] Program Instruction APA-PI-75-9, October 25, 1974.

Finally, in *Youakim* v. *Miller*, No. 73 C 635 (D. Ill. July 27, 1976),[5] the court considered a similar Illinois statute[6] and concluded that it violated Title IV of the Social Security Act and the Supremacy Clause of the United States Constitution. The State of Oregon's attempts to distinguish *Youakim* from the present case have no merit. *See also Clampett* v. *Madigan*, Civ. No. 73-4018 (D. S.D. May 24, 1973).

In conclusion, after review of the legislative history and explicit language of Title IV of the Social Security Act, the interpretation of the statute by the agency, and the applicable case law, I find that the Oregon policy and practice, insofar as it denies eligibility for foster care payments to foster parents providing homes for children related to them, violates Title IV of the Social Security Act. Because of the Supremacy Clause of the United States Constitution, article VI, clause 2, the challenged statutes must fall. *Van Lare* v. *Hurley*, 421 U.S. 338 (1975); *King* v. *Smith*, 392 U.S. 309 (1968). It is unnecessary for me to reach the equal protection issue.

Accordingly, plaintiffs' motion for summary judgment should be granted.

Dated this 31 day of January, 1977.

/s/ *George Juba*
United States Magistrate

[5] Originally, a three-judge court held that the Illinois statutory scheme did not violate the equal protection clause and granted judgment for the defendant State. *See* 374 F. Supp. 1204 (D. Ill. 1974). The United States Supreme Court remanded the case for the District Court to consider the Supremacy Clause issue. *See* 44 U.S.L.W. 4467 (March 31, 1976).

[6] " 'Foster family home' means a facility for child care in residences of families who receive no more than [eight] children unrelated to them . . . for the purpose of providing family care and training for the children on a full-time basis." Ill. Rev. Stat. 2212.17.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

NINA JONES, et al.,

Plaintiffs,

vs.

RICHARD DAVIS, et al.,

Defendants.

CIVIL NO. 76-805

JUDGMENT AND ORDER

IT IS ORDERED:

1. ORS §418.625 and CSD Rule 22.105, to the extent they prevent the certification of foster homes solely because the homes are operated by persons related to the foster children, are invalid.

2. Defendants shall promptly commence payment of the full foster care rates and shall provide all corresponding benefits and services to all otherwise eligible persons who were providing foster care on or subsequent to February 1, 1977, but who were not receiving such payments or services because of the provisions declared invalid herein. These payments shall be made effective as of the date each such person began providing foster care, but in no case earlier than February 1, 1977.

3. Defendants shall further notify such persons, by the notice attached hereto, that they are now eligible for such payments and services and the reasons therefor.

4. Plaintiffs are entitled to recover judgment against Defendants for their actual costs as taxed by the Clerk in the amount of $....., plus an award of attorney's fees in the amount of $1,650.00.

Dated this 8 day of April, 1977.

/s/ James M. Burns

Judge James M. Burns

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
SOUTHERN DIVISION

CIV73-4018

Marie Clampett, individually and on behalf of her foster children, Joseph Packard, Jr., Marcus Packard, and Cynthia Packard, and Evelyn Staub, individually and on behalf of her foster children, Doyle Medicino Eagle and Timothy Medicino Eagle, and on behalf of themselves and all others similarly situated,

Plaintiffs

vs.

John E. Madigan, individually and in his capacity as Director, State Department of Public Welfare, and his agents, representatives and assigns of the State Department of Public Welfare,

Defendants

MEMORANDUM DECISION

Mr. Stephen L. Povar, of Rosebud, South Dakota, appeared in behalf of the plaintiffs;

and

Mr. R. K. Krogstad, Special Assistant Attorney General,

Department of Public Welfare, of Pierre, South Dakota, appeared in behalf of the defendants.

This is a civil rights suit instituted pursuant to 42 U.S.C. Sec. 1983, seeking declaratory and injunctive relief authorized by 28 U.S.C. Secs. 2201, 2202, and by Rule 57 of the Federal Rules of Civil Procedure. Plaintiffs also seek to maintain the suit as a class action as provided by Fed. R. Civ. P. 23(a), (b)(2) & (b)(3). Jurisdiction is conferred upon this court by 28 U.S.C. Sec. 1343(3) & (4).

The plaintiffs are two similarly situated mothers who are related to the foster children residing in their homes. Marie Clampett and her husband reside in Lake Andes, South Dakota, with their five children and three foster children. The three foster children were placed there by the South Dakota Department of Public Welfare (DPW). Authority was given to make such a placement on December 1, 1972, by an order of the Rosebud Sioux Tribal Court. Public assistance payments of $144 per month were granted plaintiff Clampett upon her application for Aid to Dependent Children (ADC). Marie Clampett is the paternal aunt of the foster children, Joseph, Marcus and Cynthia Packard.

On November 1, 1972, at the conclusion of a foster home study conducted by the DPW, the Clampett home was recommended for licensing as a foster care home. *See* SDCL Secs. 26-6-9 to 26-6-11 (1967). On November 27, 1972, plaintiff Clampett requested that her foster children be removed from ADC and that she be paid foster care payments for their care. That request was denied. At her fair hearing appeal the denial was affirmed (1) because "state foster care funds are not used to pay a relative," and (2) because six is the maximum number

of children permitted to reside in a licensed foster care home, including the children of the foster parents. The Clampett home exceeded this limitation by two, precluding eligibility for foster care payments. Plaintiff Clampett has continued to receive assistance through the ADC program.

Evelyn Staub and her husband reside in Winner, South Dakota, with two foster children placed there by the DPW. Subsequent to a declaration that the two children were dependent and wards of the State, a court order issued by the Tenth Judicial Circuit of the State of South Dakota on October 1, 1972, gave the DPW custody of Doyle and Timothy Medicine Eagle. Mrs. Staub is the great aunt of these foster children. Plaintiff Staub formally requested foster care payments on February 14, 1973. Based upon the policy established by the South Dakota Public Welfare Commission, which prohibits payment of foster care funds to relatives within a certain degree, Mrs. Staub's request was denied.

Jointly, the two plaintiffs, on their own behalf and on behalf of all others similarly situated, initiated this civil rights action to enforce their Constitutional rights of due process and equal protection of the laws, as provided by the Fourteenth Amendment, and to correct an alleged deprivation of their rights granted under the Social Security Act of 1935. 42 U.S.C. Sec. 301 *et seq.* Their requests for a temporary restraining order and a preliminary injunction have been denied. A hearing for a permanent injunction was held and the plaintiffs submitted a brief. The defendants waived filing a brief, preferring to rely upon their oral argument and a reproduced copy of that portion of the Manual of the South Dakota State Department of Public Welfare regulations pertaining to foster care to explain their position.

The State of South Dakota has a state-wide foster care program. That program, as evidenced by the Manual of the South Dakota State Department of Public Welfare (hereinafter "Manual") is financed by a number of separate and independent sources, each containing their own prerequisites which must be complied with before their funds are available. These various sources of revenue, which provide the support for foster children, are all administered locally by the DPW and subject to its regulations. *See* Manual of the South Dakota State Department of Public Welfare Part IV-5F. The State's funds (State Foster Care) are used to supplement these diverse sources of funding. One such source of funding the State may look to for support of a dependent child is ADC Foster Care (Federal Foster Care), representing the federal contribution to this State program. However to be eligible for Federal Foster Care the foster child must comply with that program's listed requirements. Manual at IV-5F-12 to 14. The State Foster Care funds are also subject to certain other limitations.

The State regulation in issue provides that "State Foster care funds are not used to pay a relative." Manual at IV-5F-14. A "relative" under these circumstances is a:

> a) father; mother; grandfather; grandmother; brother; sister; stepfather; stepmother; stepbrother; stepsister; uncle; aunt; first cousin; nephew or niece; including those of half-blood.
>
> b) relatives of the preceding generation denoted by prefixes of grand or great, as specified in subparagraph (a).
>
> c) • • •
>
> d) • • •

See Manual at IV-5F-13 & 14.

It is this State administered program, with its accompanying State regulations, which has come under attack by the plaintiffs.

The plaintiffs contend that they are being denied the economic advantages of foster care payments because they are related to the foster children placed in their homes. They reason that a system of aid which allows more money for the placement of foster children in entirely strange homes, rather than with relatives, tends to economically induce the placing of dependent children in unrelated foster homes and, consequently, denies the child the benefit of social and psychological ties already present within the existing family structure. Currently, the foster children in question receive approximately $36 per month on ADC. If they were found eligible for foster care payments under the State's regulations, plaintiffs would receive $65 per month, with an additional allowance for clothing. Manual at IV-5F-15.

The plaintiffs assert in their amended complaint that the exclusion of relatives from the foster care program was established by the South Dakota Public Welfare Commission and is in violation of the Social Security Act of 1935 because: (1) it discourages the maintenance of a family life between dependent children and related foster parents contrary to the stated purpose of the Social Security Act, 42 U.S.C. Sec. 601; and (2) Title IV-5F of the DPW's Manual violates the Social Security Act because its regulations do not determine need and the amounts of assistance for *all* applicants on an objective and equitable basis as demanded by the United States Department of Health, Education and Welfare's (HEW) regulations. 45 C.F.R. Sec. 233.20(a)(1).

I am persuaded by the plaintiffs' arguments and agree with their contentions. In addition, I find that the most efficient method for correcting this state-wide application of this regulation is to permit the plaintiffs to proceed as a class pursuant to Fed.R.Civ.P. 23(a), (b)(2). The plaintiffs are representative of that class of people who, as relatives of foster children not legally obligated for such children's support, are being denied foster care assistance by the defendants as directed by the DPW's regulation. Manual at IV-5F-14.

The State of South Dakota has chosen to participate in the provisions of the Social Security Act of 1935, 42 U.S.C. Sec. 301 *et seq.* States desiring the advantages of the substantial federal funds available in administering categorical assistance programs must conform with the requirements of the Social Security Act and with the rules and regulations promulgated by HEW. King v. Smith, 392 U.S. 309, 317, n.34, 88 S.Ct. 2128, 20 L.Ed.2d 1118 (1968). South Dakota has chosen to participate in this federal program and has provided for receipt of the federal monies disbursed thereunder. SDCL 26-4-10 (Supp. 1973).

That portion of the Social Security Act of immediate concern to these plaintiffs is the part authorizing Aid to Families With Dependent Children (AFDC), 42 U.S.C. Secs. 601 *et seq.*, denominated Aid to Dependent Children (ADC) under South Dakota law. SDCL Chapter 28-7 (1967).

Congress expressed its purpose for enacting the AFDC program at 42 U.S.C. Sec. 601.

> For the purpose of encouraging the care of dependent children in their own homes *or in the homes of relatives* by enabling each State to furnish financial assistance and rehabilitation and other services, . . .,

> to needy dependent children and the parents *or relatives* with whom they are living to help maintain and strengthen family life and to help such parents *or relatives* to obtain or retain capability for the maximum self-support and personal independence consistent with the maintenance of continuing parental care and protection, ... (emphasis added.)

This purpose has been defeated by the provisions of Title IV-5F of the DPW's Manual. Keeping in mind the economic realities of raising foster children, the South Dakota regulations discourage relatives from opening their homes to related dependent children by refusing to pay related foster parents the same amounts paid to unrelated foster parents. The State has determined that $65 per month, plus a clothing allowance, is necessary to adequately support a foster child. Manual at IV-5F-15. Nevertheless, under a regulation promulgated by the Public Welfare Commission, if the foster home is that of a relative, foster care funds are denied to those substitute parents and other assistance must be sought. This pecuniary distinction is imposed upon related foster parents even though they are not legally obligated to support the dependent child prior to placement, SDCL Chapter 25-7, as amended, and in spite of the well-recognized fact that "it costs more to support a child in a foster home than in his own home." Ramos v. Montgomery, 313 F.Supp. 1179, 1182 (S.D.Cal. 1970), *aff'd mem.* 400 U.S. 1003 (1970); *see also* Senate Report No. 744, 2 U.S. Code Cong. & Admin. News 2834, 3001 (1967). The State, once having determined that a foster child required $65 per month for adequate support, "may not assume that a (welfare) recipient's relatives, not legally responsible for his support, will charge less than other persons providing (similar care)." Marotti v. White, 342 F.Supp. 823, 826 (D.Conn. 1972).

The plaintiffs' second contention, establishing a conflict between South Dakota's regulatory scheme and the HEW regulations promulgated pursuant to the Social Security Act, pertains to the requirements for State plans receiving federal financial participation. In particular, 45 C.F.R. Sec. 233.20 directs "that the determination of need and amount of assistance for all applicants and recipients will be made on an objective and equitable basis . . .." The defendants did not address themselves to this specific issue and, in any event, this court feels their argument would be frivolous in light of the well-reasoned opinions cited by plaintiffs in their brief.

The defendants have sought, generally, to justify the foster care payment differential by pointing out that their definition of "foster care" calls for a "social service which provides substitute care for a child for a planned period outside his own *or a relative's home* when his own family cannot care for him for a temporary or extended period." (emphasis added) Manual at IV-5F-1. Thus, as I interpret the defendants' argument, by definition the relatives of dependent children, children who have otherwise qualified for South Dakota's foster care program, are precluded that financial assistance found necessary to adequately support a foster child solely because of this familial tie; a kinship which under South Dakota law incurs no legal obligation to support and care for those dependent children until placed there by the DPW. This argument is unpersuasive and fails to justify the State's discrimination.

This court finds that a conflict exists between the stated purpose of the Social Security Act of 1935 along with the regulations promulgated thereunder, and the South Dakota foster care regulations. The discrimination in

payments between the two classes of otherwise similarly situated foster parents discourages the rehabilitation of a child's family life with relatives, and to this extent the State welfare regulations are inconsistent with the Social Security Act. Therefore, this court finds for the plaintiffs and enjoins the defendants from denying foster care payments to otherwise qualified applicants solely because the foster parent is related within a certain degree to the foster child.

Plaintiff Marie Clampett, under the facts of this decision, would be eligible for foster care payments for one of her foster children. Plaintiff Evelyn Staub is eligible for foster care for both of her foster children. Plaintiffs will submit an order in conformity with this memorandum decision.

Done and entered at Sioux Falls, South Dakota, this 24th day of May, 1973.

By The Court:

Fred J. Nichol
Chief Judge

UNITED STATES DISTRICT COURT
For The
NORTHERN DISTRICT OF OHIO
Eastern Division

IRENE JACKSON
331 Highland SE
Massillon, Ohio
Individually and on behalf of a class of persons similarly situated,

Plaintiffs

-vs-

OHIO DEPARTMENT OF PUBLIC WELFARE
c/o John E. Hansan, Director
408 East Town
Columbus, Ohio

and

STARK COUNTY WELFARE DEPARTMENT
c/o Logan Burd, Director
Seventh Floor
Stark County Office Building
Canton, Ohio

Defendants

CASE NO. C72-182

ORDER

On agreement of the plaintiffs and defendants and upon consideration of the Complaint and Stipulation filed herein it is hereby ORDERED, ADJUDGED, AND DECREED:

1. That Plaintiffs are entitled to a declaratory judgment that Section 1025 of the Regulations of the Department of Public Welfare, as amended by Manual Transmittal Letter #159 (issued pursuant to the interpretation of the Chicago Regional Office of HEW referred to in amended paragraph 10 of the Complaint), is inconsistent with the Social Security Act insofar as said section, as amended, eliminates the possibility of using the ADC foster care rate (Section 1042 of the Regulations of the Department of Public Welfare) in situations where the child is in the home of a collateral relative or in the home of a lineal relative not owing a legal duty to support such child.

2. That Plaintiffs are entitled to a preliminary and permanent injunction restraining Defendants, the Ohio Department of Public Welfare and the Stark County Welfare Department, from enforcing Section 1025 of the Regulations of the Department of Public Welfare, as amended by Manual Transmittal Letter #159 (issued pursuant to the interpretation of the Chicago Regional Office of HEW referred to in amended paragraph 10 of the Complaint), and from enforcing the directive of Mr. Carl Albu, Deputy Director, dated November 22, 1971, insofar as they eliminate the possibility of using the ADC foster care rate (Section 1042 of Regulations of the Department of Public Welfare) in situations where a child is in the home of a collateral relative or in the home of a lineal relative not owing a legal duty to support such child.

3. That the Defendant, Ohio Department of Public Welfare, shall promulgate within sixty days of the date of filing of this Order a new regulation not inconsistent with this Order.

4. That the Defendant, Stark County Welfare Department, shall forthwith reinstitute payments at the foster

care rate to the named Plaintiff, Irene Jackson, on behalf of Rene and Kathy Richards, according to the schedule of foster care payments in effect prior to Manual Transmittal Letter #159 and the directive of Carl Albu, Deputy Director, dated November 22, 1971.

5. That one third of the costs of this action shall be paid by Plaintiffs and two thirds by the Defendant, Ohio Department of Public Welfare.

6. That all other relief prayed for by Plaintiffs in their Complaint shall be, and is hereby, denied.

Approved:
/s/ *Leroy J. Conti, Jr.*
Leroy J. Conti, Jr., Judge
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Attorney for Plaintiffs

CERTIFICATE OF SERVICE

Robert E. Lehrer hereby certifies that he is one of the attorneys for the appellees in *Youakim* v. *Miller,* No. 77-742, and that on January 6, 1978 appellees' "Motion to Affirm" was served on the appellants herein. Service was made by mailing 3 copies of this Motion to the counsel of record for appellants.

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Of Counsel.

/s/ *Robert E. Lehrer*
Robert E. Lehrer

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-742

JEROME MILLER, Individually and as Director of THE DEPARTMENT OF CHILDREN AND FAMILY SERVICES and THE DEPARTMENT OF CHILDREN AND FAMILY SERVICES of the STATE OF ILLINOIS,

Appellants

vs.

MARCEL YOUAKIM and LINDA YOUAKIM individually and as foster parents, TIMOTHY ROBERTSON, a minor, by his sister and next friend LINDA YOUAKIM, MARY LOU ROBERTSON, a minor, by her sister and next friend LINDA YOUAKIM, LARRY ROBERTSON, a minor, by his sister and next friend LINDA YOUAKIM, and SHERRY ROBERTSON, a minor, by her sister and next friend LINDA YOUAKIM, and all others similarly situated,

Appellees

On Appeal From the United States Court of Appeals for the Seventh Circuit

BRIEF AND ARGUMENT FOR APPELLANTS

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-742

JEROME MILLER, Individually and as Director of THE DEPARTMENT OF CHILDREN AND FAMILY SERVICES and THE DEPARTMENT OF CHILDREN AND FAMILY SERVICES of the STATE OF ILLINOIS.

Appellants.

VS.

MARCEL YOUAKIM and LINDA YOUAKIM individually and as foster parents, TIMOTHY ROBERTSON, a minor, by his sister and next friend LINDA YOUAKIM, MARY LOU ROBERTSON, a minor, by her sister and next friend LINDA YOUAKIM, LARRY ROBERTSON, a minor, by his sister and next friend LINDA YOUAKIM, and SHERRY ROBERTSON, a minor, by her sister and next friend LINDA YOUAKIM, and all others similarly situated,

Appellees.

On Appeal From the United States Court of Appeals for the Seventh Circuit

BRIEF AND ARGUMENT FOR APPELLANTS

OPINIONS BELOW

The opinion of the United States Court of Appeals is reported at 562 F. 2d 483 (7th Cir. 1977) and is reproduced in Appendix B of appellants' Jurisdictional Statement. The memorandum opinion of the district court rendered July 27, 1976, which is reproduced as an appendix to the decision of the court of appeals, is reported at 431 F. Supp. 40 (N.D. Ill.) The judgment order of the district court entered August 24, 1976 (Jurisdictional Statement, Appendix C) is not reported. The opinion of the Supreme Court of the United States rendered in this cause on March 31, 1976 (Jurisdictional Statement, Appendix D) is reported at 425 U.S. 231, 47 L. Ed. 2d 701. The opinion of the three judge district court originally assigned to hear this cause, rendered on February 28, 1974 (Jurisdictional Statement, Appendix E), is reported at 374 F. Supp. 1204 (N.D. Ill.)

JURISDICTION

Appellees brought a civil rights action alleging jurisdiction under 28 U.S.C. §§ 1343(3), (4), 2281 and 2284 to enjoin the enforcement of the foster home provisions of the Illinois Child Care Act, Ill. Rev. Stat., 1971, ch. 23, §§ 2212.05, 2212.17 and 5005, as violative of the United States Constitution and the Social Security Act. On September 27, 1977, the United States Court of Appeals for the Seventh Circuit affirmed the district court's determination that the Illinois statutes violated the Social Security Act and the supremacy clause of the United States Constitution.

Appellants filed their notice of appeal in the court of appeals on November 3, 1977. (Jurisdictional Statement,

Appendix F) Appellants have invoked the jurisdiction of this Court to review the decision of the court of appeals by virtue of 28 U.S.C. § 1254(2). This Court noted probable jurisdiction on February 21, 1978.

QUESTION PRESENTED

Whether the Illinois statutory foster care scheme, which provides monetary foster care benefits on behalf of children living only with persons unrelated to them, is consistent with the purpose and meaning of the AFDC foster care program under the Social Security Act, and is therefore consistent with the supremacy clause of the United States Constitution?

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

U.S. Const., art. VI;
42 U.S.C. § 601;
42 U.S.C. § 602(a);
42 U.S.C. § 603;
42 U.S.C. § 605;
42 U.S.C. § 606;
42 U.S.C. § 607(a);
42 U.S.C. § 608;
45 C.F.R. § 220.19 (1975);
45 C.F.R. § 233.90(c)(1)(v) (1975);
45 C.F.R. § 233.90(c)(2) (1975);
45 C.F.R. § 233.110 (1975);
Ill. Rev. Stat. 1971, ch. 23, §§ 4-1 to 4-11;

Ill. Rev. Stat. 1971, ch. 23 § 2212.05;
Ill. Rev. Stat. 1971, ch. 23, § 2212.17;
Ill. Rev. Stat. 1971, ch. 23, § 5001;
Ill. Rev. Stat. 1971, ch. 23, § 5005.

(See Supplement in back of this brief for reproduction of these provisions.)

STATEMENT OF THE CASE

As part of the federal program for Aid to Families with Dependent Children, the State of Illinois provides federally subsidized foster care payments (AFDC-FC) of up to $105 per month for a dependent child living in a foster family home or child care institution (42 U.S.C. § 608). Under the Illinois Child Care Act, the state does not grant foster care payments to persons who are related to the children for whom they care. Ill. Rev. Stat., 1971, ch. 23, § 2212.17. Instead, persons related to dependent children are eligible to receive payments of $63 per month under the state's basic AFDC program. However, as an exception to its general policy, the State of Illinois will supplement payments to persons caring for related dependent children upon a showing of need, which may bring the total AFDC payments to $105 per child. (A. 39-40)

Appellees in this case [hereinafter referred to as "plaintiffs"] are Marcel and Linda Youakim, husband and wife, and Timothy, Mary Lou, Larry and Sherry Robertson, Linda Youakim's minor brothers and sisters. In 1969, the minor plaintiffs were declared wards of the state, and since that time, Larry and Sherry Robertson have been living at unrelated foster care facilities. (A. 7-8) Since 1972, the Youakims have provided a home for Timothy and Mary Lou after signing a Relative Home Placement Agreement in which they agreed to provide for these children's physical, mental, emotional and spiritual needs. (A. 20-23) The Youakims were found ineligible to receive AFDC-FC pay-

ments of $105 per month for each child because they are related to Timothy and Mary Lou, but were instead found eligible for assistance under the basic AFDC program.[1]

On March 13, 1973, plaintiffs filed a civil rights class action pursuant to 42 U.S.C. § 1983 in the United States District Court for the Northern District of Illinois against the Illinois Department of Children and Family Services and Jerome Miller, its former director [hereinafter referred to as "defendants"]. (R. 1) On April 2, 1973, defendants filed their motion to strike and dismiss. (A. 41-42) In their Second Amended Complaint filed January 21, 1974, plaintiffs alleged that because they could not receive regular AFDC-FC payments at the prevailing $105 rate, plaintiffs could neither provide adequate care for Timothy and Mary Lou, nor consider bringing Larry and Sherry into the Youakim home. Plaintiffs further contended that the Illinois foster care scheme violates the equal protection clause of the Fourteenth Amendment to the United States Constitution because it authorizes foster care payments to unrelated foster parents but refuses to allow foster care payments to persons related to the children for whom they care. Plaintiffs asked the court to enjoin defendants from enforcing Ill. Rev. Stat., ch. 23, §§ 2212.05, 2212.17, and the Department's Placement Manual, ch. 5, § 3, as violative of the equal protection clause. (A. 5-20)

The parties stipulated that defendants' motion to dismiss could stand as to the amended complaint. A three-judge court was convened pursuant to plaintiffs' request and on February 28, 1974, the three-judge court granted

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1. Since 1974, the Youakims have received supplemental payments for the care of Timothy and Mary Lou, and they now receive monthly payments totaling $105 for each child.

defendants' motion to dismiss. The court specifically found that the Illinois scheme did not violate plaintiffs' right to equal protection. (Jurisdictional Statement, Appendix E)

On April 23, 1974, plaintiffs filed their Notice of Appeal to the United States Supreme Court. (R. 21) In their jurisdictional statement, plaintiffs not only raised their equal protection challenge, but also claimed that the Illinois foster care scheme is inconsistent with the Social Security Act and, therefore, violates the supremacy clause. The Supreme Court noted probable jurisdiction on March 17, 1975, and on March 31, 1976, the Court vacated and remanded the judgment of the three-judge district court. The Supreme Court stated that the supremacy clause issue was not presented to the three-judge court as a separate ground for decision. In addition, the Court noted that after the filing of plaintiffs' jurisdictional statement but before probable jurisdiction was noted, the Department of Health, Education and Welfare (HEW) had issued a "Program Instruction" which stated that the AFDC-FC rate applied "regardless of whether or not the foster care home is operated by a relative." (A. 48-50) This position was supported by the Solicitor General in his *amicus* memorandum to the Court. (A. 51-56) In light of these factors, the Supreme Court felt that the district court should be given an opportunity to rule on plaintiffs' supremacy clause claim. (Jurisdictional Statement, Appendix D)

On remand, plaintiffs filed a motion for preliminary injunction and summary judgment on June 10, 1976 (A. 44-47), and defendants filed a cross motion for summary judgment on June 14, 1976 (A. 57-58). On July 27, 1976, the district court, acting through a single judge, granted plaintiffs' motion for summary judgment. The court found that the Illinois foster care statutes, (Ill. Rev. Stat., 1971,

ch. 23, §§ 2212.05, 2212.17 and 5005) were repugnant to §§ 401 and 408 of the Social Security Act (42 U.S.C. §§ 601, 608) and to the supremacy clause of the United States Constitution. (Jurisdictional Statement, Appendix B, 31) At the same time, the court found it unnecessary to reach the equal protection issue. On August 24, 1976, the court enjoined defendants from enforcing the Illinois statutes insofar as those statutes excluded persons related to foster children from eligibility under the AFDC-FC program. In addition to other relief not relevant here, the court ordered defendants to make full AFDC-FC payments to otherwise eligible foster parents who currently have related foster children living with them. (Jurisdictional Statement, Appendix C)

On August 24, 1976, defendants filed their Notice of Appeal to the seventh circuit from the district court orders. (R. 41) On September 27, 1977, the court of appeals rendered its opinion affirming, with slight modification, the orders entered by the district court. (Jurisdictional Statement, Appendix B).

SUMMARY OF ARGUMENT

I. The Illinois statutory foster care scheme which distinguishes between relatives caring for related children and strangers who act as foster parents is consistent with the Social Security Act and the supremacy clause of the United States Constitution.

The basic AFDC program established by the Social Security Act (42 U.S.C. §§ 601-606) provides aid to needy children who live with their parents and certain close relatives. The supplemental AFDC-FC program (42 U.S.C. § 608) provides aid to children who are removed by court order from the homes of these persons and placed in foster family homes or child-care institutions. The fact that Congress has explicitly provided AFDC for children living with related persons indicates a congressional intent not to include such children in the AFDC-FC program.

The distribution of public aid funds by the State of Illinois parallels the federal welfare program. Under Illinois law, essentially the same class of relatives designated in the Social Security Act is eligible for public aid under the state AFDC program. AFDC-FC assistance is administered under a separate program which defines a "foster family home" as a residence which receives unrelated children. Since plaintiffs care for needy children who are related to them, they have properly received public assistance under the AFDC program rather than under the foster care program.

A. The Social Security Act itself distinguishes between foster parents and related persons who care for a child. Unquestionably, the predominant purpose of the AFDC program, as set forth in § 401, is to insure that

whenever possible dependent children will be cared for in homes provided by close relatives. Each of the provisions pertaining to the basic AFDC program consistently treat parents and close relatives as one entity. Under the basic program, money payments as well as medical and remedial care are provided for both needy dependent children and the adult relatives with whom they live.

However, the Act likewise shows Congressional concern with the much broader problem of the care and protection of children generally. Initially, children whose welfare was jeopardized in the home of a parent or relative could not obtain federal assistance if they were removed from a related home and placed with non-relatives. The Act was amended to require that states which participate in the federal welfare program must provide aid in the form of foster care for children who are removed from the home of a parent or relative and placed in a foster home or child-care institution. Congress could not have intended to merely duplicate federal assistance which was already provided under AFDC to parents and close relatives of dependent children. Rather, the newer AFDC-FC program was meant to remedy those situations where related care is either unavailable or inadequate by providing a less desirable but necessary alternative to care in the child's own home in the form of foster care.

B. The legislative history of the Social Security Act indicates that Congress intended the foster care program to function simply as a supplement to the regular AFDC program. Since the origin of the Social Security Act, AFDC payments have been administered under Title IV, whereas aid to foster children was first administered in a less structured fashion under Title V. In 1961, the states were given the option of bringing dependent children in need of foster care into the federally aided program un-

der Title IV. This new legislation followed a recognition by Congress that some home environments are contrary to the best interests of children and remedial action was not possible unless the states were granted additional funds in order to provide for care of the child in a foster family home or child-care institution when necessary. The Senate Committee expressly noted that the foster care program gave the states an alternative to leaving children in unsuitable homes of parents or relatives, or caring for them elsewhere without federal participation in the cost.

Therefore, the Illinois practice of treating related persons separately from foster parents, and of granting a higher level of payments to foster home care, conforms to the underlying purpose and meaning of the Social Security Act.

C. This Court has stated that it will not accept the interpretations of the agency responsible for administering the Social Security Act which are inconsistent with the federal statute; further, that little weight will be given to interpretations which conflict with earlier agency pronouncements.

Since plaintiffs are related to the needy children for whom they care, the state has properly determined that they should not be regarded as foster parents under the federal welfare program. Even though the present position of HEW regarding foster care conflicts with this determination, it was nevertheless explicitly accepted by HEW in the past, both in the official regulations contained in C.F.R. and in a letter by HEW affirming the position of the State of Illinois that plaintiffs simply are not foster parents, and are consequently not entitled to foster care benefits under AFDC-FC. The official regulations specifically regard a child as "living with" his rela-

tive for purposes of receiving AFDC benefits even though he is under the supervision of the court or in the legal custody of a state agency. Under this regulation, the present plaintiffs are eligible for participation in the AFDC program, and are not eligible for benefits under the foster care program.

Because the Illinois statutory foster care scheme is consistent with the Social Security Act and the supremacy clause of the United States Constitution, this Court should reverse the decision of the court of appeals which enjoined the enforcement of the Illinois statutes.

ARGUMENT

I.

THE ILLINOIS STATUTORY FOSTER CARE SCHEME IS CONSISTENT WITH THE PURPOSE AND MEANING OF THE SOCIAL SECURITY ACT, AND DOES NOT, THEREFORE, VIOLATE THE SOCIAL SECURITY ACT OR THE SUPREMACY CLAUSE OF THE UNITED STATES CONSTITUTION.

Introduction

Like every other state in the Union, Illinois has chosen to participate in the federal Aid to Families With Dependent Children welfare program (AFDC, 42 U.S.C. § 601 *et seq.*). Originating with the Social Security Act of 1935, this program provides aid to families with dependent children where such children are deprived of parental support because a parent is absent from the home, incapacitated or dead, and the children are living with either their natural parents or with certain relatives specified in § 406 (42 U.S.C. § 606)[2]

In addition to this basic program, Congress extended the AFDC program in 1961 to include dependent children of unemployed fathers (AFDC-E, 42 U.S.C. § 607). At the same time, the AFDC-FC program was established (42 U.S.C. § 608) to provide aid to children who were removed

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2. Section 406(a) specifies the following relatives in addition to father and mother as being within the ambit of the AFDC program laid out in § 406: grandfather, grandmother, brother, sister, stepfather, stepmother, stepbrother, stepsister, uncle, aunt, first cousin, nephew or niece.

by court order from the homes of those relatives designated in § 406 and placed in foster family homes or in child-care institutions. Under the Social Security Act, all states participating in the federal AFDC welfare program must also provide foster care payments in accordance with § 408. (42 U.S.C. § 602 (a) (20)).

This case involves the interaction of the AFDC (42 U.S.C. § 606) and AFDC-FC (42 U.S.C. § 608) programs. In administering these programs the State of Illinois distinguishes between relatives caring for related children and unrelated persons who act as foster parents of needy dependent children. Thus, under the AFDC program, which is administered by the Illinois Department of Public Aid (Ill. Rev. Stat. 1971, Ch. 23, §§ 4-1 to 4-11), needy children who are living with their parents or certain relatives specified in § 4-1.2,[3] are entitled to monthly assistance of approximately $63. Under the AFDC-FC program, which is administered by the Illinois Department of Children and Family Services (Ill. Rev. Stat., 1971, ch. 23, § 5001 *et seq.*), needy children who are living with unrelated persons are entitled to monthly benefits of approximately $105.[4]

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3. Section 4-1.2 (Ill. Rev. Stat. 1971, ch. 23, § 4-1.2) of the Illinois statute includes within the ambit of the basic AFDC program essentially the same class of relatives as provided for in § 406(a) of the Social Security Act. In addition to father or mother, § 4-1.2 of the Illinois statute specifies that the child or children must be living with one of the following relatives: grandfather, grandmother, brother, sister, stepfather, stepmother, stepbrother, stepsister, uncle or aunt, or other relative approved by the Department.

4. Section 2212.05 defines a "facility for child care" as "any person, group of persons, agency, association or organization . . . who or which receives or arranges for care or placement of one or more children, unrelated to the operator of the facility. . . ." Section 2212.17 defines a "foster family home" as "a facility for child care in residences of families who receive no more than 8 children unrelated to them. . . ."

There is no question in this case that plaintiffs are eligible to receive some federal welfare assistance. The dispute evolves from plaintiffs' contention that they necessarily are included within the class of "foster parents" set out in the supplemental AFDC-FC program rather than the class of "relatives" set out in the basic AFDC program, even though they are related to the needy children for whom they care, and thus are covered under the regular AFDC program set out in § 406. Plaintiffs, therefore, claim to be entitled to monthly assistance of $105 per month rather than to the $63 per month allocated under the basic AFDC program. The logical extension of plaintiffs' claim that they are entitled to AFDC-FC assistance is that they are covered in two areas of the federal welfare scheme—the basic AFDC program under § 406, and the foster care program under § 408. However, the fact that Congress explicitly provided AFDC for children living with related persons under § 406 is strong evidence of a congressional intent not to include such children in the AFDC-FC program. (*See Burns* v. *Alcala*, 420 U.S. 575, 43 L. Ed. 2d 469, 476 (1975).)

The defendants respectfully submit that since persons situated like plaintiffs are eligible under the federal welfare scheme for AFDC benefits, they are properly excluded from foster care benefits; further, that the AFDC and AFDC-FC programs as administered by the State of Illinois, which distinguish between relatives caring for re-

lated children and strangers who act as foster parents, are consistent with the requirements and underlying purposes of the Social Security Act as well as the long-standing policy of HEW.

A.

The Plain Meaning Of The Social Security Act Indicates That Congress Intended To Provide AFDC Assistance To Needy Children Cared For By Relatives, Such As Plaintiffs, Through § 406 Rather Than Through The Foster Care Program Contained In § 408.

As stated above, §§ 401 through 406 of the Social Security Act constitute the basic AFDC program. The purpose of the basic program, as stated in § 401, is to help maintain and strengthen family life by encouraging the care of dependent children in the homes of their parents, or alternatively, in the homes of relatives. To accomplish this purpose, federal appropriations are authorized under § 401 to enable each state to furnish financial assistance and other services to needy dependent children, and to the parents or relatives with whom they are living. The subsequent sections pertaining to AFDC provide the mechanism by which the above goal is to be achieved. Notably, each section regards certain relatives on an equal basis with the natural parent.

Section 406 designates those persons who are eligible for AFDC. The first such group consists of "needy dependent children." (§ 406 (a)) These are children who have been deprived of parental support or care by reason of the death, continued absence, or physical or mental incapacity of a parent; who are under 18 years of age, or under 21 and are students; and who are living with their father or mother, or with certain specified close relatives. A needy

dependent child now also includes a child who has been deprived of parental care or support because of the unemployment of his father, and who is living with his parents or certain close relatives (§ 407). If a child fits into any one of these categories, he is considered eligible by federal standards for AFDC assistance. The minor plaintiffs meet the criteria for AFDC assistance, and they are, indeed, receiving such assistance.

The families of dependent children may likewise be eligible for AFDC assistance. Under § 406(b), the term "aid to families with dependent children" means money payments, as well as medical or remedial care in behalf of a dependent child. By amendment in 1950, adult relatives such as the Youakims who care for dependent children also became eligible for these benefits under § 406(b)(1). (See S. Rep. No. 165, 87th Cong., 1st Sess. (1961) U.S. Cong. & Adm. News, V. 2, 1723). Section 406(c) redefines the term "relative" within the meaning of the basic AFDC program as any individual specified in § 406(a) (such as natural parents, grandparents, sister or brother) with whom a dependent child is living in a place of residence maintained by that individual as his own home. These provision leave no question that natural parents and close relatives such as the Youakims conceptually constitute one complete category regarding AFDC benefits.

Numerous other AFDC provisions support the proposition that the terms "parent" and "relative" are consistently regarded as one unit throughout the basic AFDC welfare scheme, thus reinforcing the concept that children situated like the minor plaintiffs in this case, when cared for by either parents or relatives, are eligible for federal

welfare assistance under the basic AFDC program.[5] However, while these provisions clearly establish that, under the federal welfare scheme, the home of a parent or relative remains the ideal environment for a child, at the same time an even more important purpose behind the federal program granting aid for the care of children is the overall interest of the public in the protection of the child. *See King* v. *Smith*, 392 U.S. 309, 20 L. Ed. 2d 1118, 1130 (1968); *Ramos* v. *Montgomery*, 313 F. Supp. 1179, 1181 (S.D. Cal. 1970) aff'd 400 U.S. 1003, 27 L. Ed. 2d 618 (1971).

In this regard, Congress has recognized the difficulties sometime encountered in maintaining and strengthening "family life," and has provided several alternatives where the child's welfare is threatened by the misconduct of a parent or close relative. Once such alternative is found in § 406(b)(2), which includes a new concept of "protective payments" in the definition of "aid to families with dependent children."[6]

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5. For example, § 402(a)(7) provides that the state agency shall, in determining AFDC need, take into consideration any other income and resource of any child or relative claiming aid to families with dependent children. Section 402(a)(19) provides that every individual receiving assistance must register for manpower services, training or employment, unless such individual is a mother or other relative who is caring for a child under the age of six. Section 405 provides for counseling and guidance to relatives who are unable to manage the use of welfare payments for the benefit of the child.

6. These protective payments, instituted in 1962, are an important safeguard for the child in situations where his welfare is jeopardized. They allow the states to make payments, including direct vendor payments for food and various services, to other interested or concerned individuals when welfare funds are misused by an incompetent or irresponsible parent or relative. (S. Rep. No. 1589, 87th Cong., 2d Sess. (1962) U.S. Cong. & Adm. News, V. 1, 1954; S. Rep. No. 744, 90th Cong., 1st Sess. (1967) U.S. Cong. & Adm. News, V. 2, 2837.)

The new protective payment provision in § 406(b)(2) contains several limitations—it applies only to a state whose welfare plan provides for a determination by the state agency that payments in this form are necessary because the relative is so unable to manage funds that it would be contrary to the child's welfare to make the payments to such relative (§ 406(b)(2)(A). The provision requires special efforts by the state to improve the ability of the relative to manage the funds (§ 406(b)(2)(B). The provision also calls for periodic review to determine whether payments in this form are still necessary, and for judicial appointment of a guardian or legal representative if the need for payments to another interested individual continues beyond a specified period (§ 406(b)(2)(c). The state plan must additionally provide for foster care benefits. (§ 406(b)(2)(D))

More significantly, Congress has required that states participating in the federal welfare program must provide for aid in the form of foster care in behalf of a child described in § 408. (See 42 U.S.C. § 606(b)(2)(D)). Prior to the enactment of the foster care program, a child removed from the home of a parent or relative because of abuse, neglect, or other unsuitable condition, and subsequently placed in the home of a non-related person simply could not obtain aid under § 406. In response to this problem, Congress enacted the § 408 AFDC foster care program so that children who could not live with a parent or specified relative, and who had to live with a non-relative, could nevertheless obtain federal financial assistance.

In contrast to the basic AFDC program under § 406, the foster care provisions of § 408 support the interpretation that Congress intended to extend AFDC assistance to a group definitely not previously covered i.e., unrelated persons caring for needy children. Whereas § 406 consistently treats parents and close relatives as a single unit, the terms "foster care" and "child-care institution" regularly appear together as another separate unit in § 408. Thus, § 408(a) defines a child who is eligible for foster care payments as one who would meet the requirements of § 406, except that he has been (a) removed by court order from the home of a parent or specified relative because continuation there would be contrary to his welfare, (b) is placed under the responsibility of a state or local agency which meets requirements not relevant here, (c) is placed in a foster family home or child-care institution, and (d) had been receiving AFDC or was eligible to receive AFDC at the time the court proceedings were initiated or within six months prior to the time judicial proceedings began.

Needy dependent children who are removed, with or without a court order, from the home of one § 406 relative and placed in the home of another § 406 relative are now, and always have been, entitled to AFDC assistance. *See* 45 C.F.R. § 233.90(c)(1)(v)(B). Section 408(a) specifically defines a needy dependent child as one who has been removed from the home of a parent or relative because the conditions in such home have become unsuitable. Congress could not have intended by the provisions of § 408(a) to merely duplicate federal assistance which was already provided under AFDC to dependent children living with parents and close relatives. Rather, the newer AFDC-FC program was clearly meant to remedy those situations where related care for dependent children is either unavailable or inadequate by providing a less desirable but necessary

alternative to care in the child's own home or home of a relative in the form of foster care. Thus, while the basic AFDC program relates to needy children who are living with parents or close relatives, the federal foster care program under § 408(a) can only refer to needy dependent children who are living somewhere other than in the home of a parent or close relative.

Section 408(b) extends the definition of "aid to families with dependent children" by providing that it "shall notwithstanding § 406(b) . . . *include also* foster care in behalf of a child described in paragraph (a) of this section—(1) in the foster family home of any individual . . . or (2) in a child-care institution." (emphasis added) It is plain that by using the words "include also" in § 408(b), Congress extended the AFDC program from related care which was already covered under § 406 to child care in a foster home by an unrelated person. Plaintiffs isolate the words "any individual" in this section to support their claim that children living in homes maintained by relatives are eligible for foster care benefits. However, in interpreting a statute, the Court is not guided by a single sentence or member of a sentence, but must look to the provisions of the whole law, to its object and policy. *Philbrook* v. *Glodgett,* 421 U.S. 707, 44 L. Ed. 2d 525, 532-33 (1975); *Richards* v. *United States,* 369 U.S. 1, 11, 7 L. Ed. 2d 492, 499 (1962). When read in light of the overall federal welfare statutory scheme, the term "any individual" in § 406(b) manifests the intention of Congress that assistance is to be provided for foster care whether the care is administered in the home of an individual person or family, or in a child-care institution. No other interpretation is logically possible.

In determining that foster care includes related care, the court of appeals placed considerable emphasis on the fact

that § 408 does not literally exclude relatives from coverage. This method of statutory construction has been emphatically rejected:

> Several of the courts . . . have held that persons who are arguably included in the federal eligibility standard must be deemed eligible unless the Act or its legislative history clearly exhibits an intent to exclude them from coverage, in effect creating a presumption of coverage when the statute is ambiguous (Citation omitted). This departure from ordinary principles of statutory interpretation is not supported by the Court's prior decisions. (*Burns* v. *Alcala,* 420 U.S. 575, 43 L. Ed. 2d 469, 475 (1975).

Instead, since the definition of "foster family home" is unclear from the statute itself, it is both necessary and appropriate to examine other sections of the federal welfare scheme in order to determine the meaning and scope of the § 408 foster care program. *Philbrook* v. *Glodgett,* 421 U.S. 707, 713, 44 L. Ed. 2d 525, 532-33 (1975).

Other provisions of the Social Security Act conclusively establish that foster care is simply not considered to be related care. Section 408(f) is especially pertinent in that it clarifies the concept that foster care, whether in a private home or in an institution, is regarded merely as a temporary measure. Under § 408(f), Congress has required that once a child is taken from the home of his parent or relative and placed in a foster home, further remedial action must be taken by the state. Thus, the state plan must:

> (f) include[s] provision for (1) development of a plan for each such child (including periodic review of the necessity for the child's being in a foster family home or child-care institution) to assure that he receives proper care and that services are provided which are designed to improve the conditions in the home from which he was removed or to otherwise make possible his being placed in the home of a relative specified in section 606(a) of this title . . . (42 U.S.C. § 608(f). (emphasis added).

This section clearly indicates that foster care is only temporary care. Foster care must be terminated whenever the child can be returned to the home of his parent or relative with whom he was living or placed in the home of another § 406 relative. If foster care constitutes care provided by relatives, it makes no sense that a child should be removed from the "foster care" of one relative and placed with another relative. Yet, the states are mandated under § 408(f) to remove the child from a foster care placement and must place the child in another relative's home as soon as possible. Instead, the only reasonable conclusion to be drawn from this provision is that Congress could not have intended to extend federal foster care coverage to a group of persons (relatives caring for needy children) who were already covered by § 406, or to needy dependent children who are living with relatives.

Finally, in authorizing greater money payments for foster care, § 403(a)(1)(B) again emphasizes that Congress intended to treat the foster care program separately from the regular AFDC program, which has included related care since the inception of the Social Security Act in 1935. The allocation of higher funds was first made in 1967, following a recognition by Congress that "[f]oster care for children is relatively costly, and States have reported that they cannot finance it without some additional Federal help." (S. Rep. No. 744, 90th Cong., 1st Sess. (1967) U.S. Cong. & Adm. News, V. 2, 3000) The Senate Committee stated that "[f]ederal sharing will be possible in payments up to $100 a month . . . for children in foster care," (Id. at 3001) in order to provide "more favorable Federal matching . . . for foster care for children removed from an unsuit-

able home [of a parent or relative] by court order." Id. at 2837-38. (emphasis added) Further comments of the Senate Committee are enlightening:

> The committee believes that the AFDC program *already offers* an opportunity for States to receive Federal financial assistance in the cost of care for many children who have no parents or who are not able to live with their parents. Under AFDC children are eligible for assistance only if they are living with one or more specified relatives . . . Federal sharing is available to reimburse the relative for the cost of providing a home for the child. . . .
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> Under the committee bill, Federal funds will be available on a more liberal basis *than for the basic program* [which includes relatives caring for an indigent child] out of a recognition that foster family care is more costly than care in the child's home . . .These liberalizations will be of material assistance to States and localities and will facilitate plans being developed for children based on the need of the child rather than the fiscal condition of the local government. Id. at 3001-02. (emphasis added)

These comments, as well as the various sections of the AFDC program when compared with the AFDC-FC provisions of § 408, leave little doubt that both parental and related home care are regarded in the federal statute as the most desirable means of protecting the child, whereas "protective payments," foster home care, and institutional child-care are separate remedies, or necessary alternatives, when conditions in the child's own home or home of a relative become unsuitable.

In examining the above provisions, the three-judge district court which initially decided this case stated that "[f]ar from being inconsistent with the federal scheme, the Illinois scheme implementing AFDC in general seems to parallel it." *Youakim* v. *Miller*, 374 F. Supp. 1204, 1210

(N.D. Ill. 1974). The three-judge district court found that the federal statute makes the same classification as the Illinois statute in two ways: (1) the federal statute authorizes aid to the natural parents and relatives of dependent children in one section (42 U.S.C. § 606), and aid to foster parents in another section (42 U.S.C. § 608); and (2) that, like the Illinois statute, the federal plan allocates more money to foster care payments than to regular AFDC payments. [Citing § 603(a)(1)(B); *Ramos* v. *Montgomery*, 313 F. Supp. 1179, 1182 (S.D. Cal. 1970)]. This Court subsequently noted:

> Had appellants [appellees here] relied on the Supremacy Clause issue as a separate ground for decision it would appear that the claim would have been rejected by the District Court. (*Youakim* v. *Miller*, 425 U.S. 231, 235, 47 L. Ed. 2d 701, 706 (1976)).

The distinction between foster parents and related persons caring for needy children was also recognized by this Court in *Burns* v. *Alcala*, 420 U.S. 575, 43 L. Ed. 2d 469 (1975), which concerned the eligibility of an unborn child to receive AFDC benefits. In denying payments to this group of recipients, the Court stated:

> The restricted purpose of the AFDC program is evidenced in the Act itself by the limitations on aid. The Act originally authorized aid only for children living with designated relatives. The list of relatives has grown . . . but there is still no general provision for AFDC payments to needy children living with distant relatives or unrelated persons, or in institutions. (43 L. Ed. 2d at 476)

The Court then added in a footnote:

> The Act now authorizes, in addition to payments for children in the homes of designated relatives, foster care payments for children who have been removed from the homes of relatives. 42 USC § 608. (43 L. Ed. 2d at 476, n. 9)

The practical result of the decision of the court of appeals in this case is the judicial creation of a special group of beneficiaries like the plaintiffs who are eligible for aid under both § 406 and § 408. The adverse impact of this decision on needy dependent children covered by the Act is readily apparent. Federal assistance is provided under § 406 to encourage relatives to voluntarily care for children who can no longer reside with their parents. By providing foster care aid under § 408 to children living with relatives, such relatives would have no incentive to care for children under the § 406 plan. Because more financial benefits are available under the § 408 foster care program, the court's decision creates a financial incentive for relatives to refrain from caring for needy children until the children have been removed from their homes by court order. This procedure, given its possible traumatizing effects, can never be in the best interests of the child.

The Social Security Act, upon which the Illinois statute is based, classifies only two groups of aid recipients—one composed of parents and relatives, and the other consisting of child-care institutions and strangers who provide foster care. The plaintiffs, who are related to the needy children for whom they care, are simply not foster parents within the ambit of the AFDC-FC program provided for in § 408. As shown, this interpretation finds clear support in the literal language of the Social Security Act.

B.

The Legislative History Of The Social Security Act Illustrates The Congressional Intent To Create A Separate Foster Care Program Distinct From The Regular AFDC Program.

Since its inception, the Social Security Act has clearly distinguished federal aid aimed at keeping a child in the

home of a parent or close relative from that granted to "homeless" children residing in foster homes. First, under Title IV, cash grants were made primarily to female heads of families who were widowed, divorced, or deserted, in order to keep young children with their mothers in their own homes. (S. Rep. No. 628, 74th Cong., 1st Sess. 17 (1935)) This was recognized as the least expensive and most desirable method for meeting the needs of these families yet devised. *Id.*

Also under Title IV, cash payments were made to certain relatives of a needy child, since a "dependent child" was then, as now, defined as one living with a near relative in a residence maintained by such relative as his own home. *Id.* at 36. At the same time, Congress gave somewhat limited notice to another separate group of needy children, and provided for them in a completely distinct program under Title V:

> Another large group of children who stand in great need of protective measures are the homeless and neglected children. There are in this country approximately 300,000 dependent and neglected children, three-fifths of whom are cared for *in institutions,* and the remainder *in foster homes.* . . . [T]hese children "are in many respects the most unfortunate of all children, as their lives have already been impaired. To repair these damaged lives, as far as possible, and to keep these children from becoming a permanent burden to society, child-care services have been established in most urban centers, but in less populous areas they are exceedingly limited or nonexistent." . . . To stimulate the development of these badly needed child-care services, . . . a small amount of Federal aid (which does not have to be matched) is *authorized in title V.* (S. Rep. No. 628, 74th Cong., 1st Sess. 19 (1935)) (emphasis added)

For over twenty-five years these two programs existed separately. In 1961, however, it was recognized that even though the objective of the federal welfare program is to provide cash assistance for needy children in their own homes, that is, in the home of a parent or close relative,

> ... there are some home environments that are clearly contrary to the best interests of these children. . . . Often, however, remedial action on behalf of the child was not possible. We believe that this undesirable situation could be avoided, in many instances, if assistance under this program were available for the care of the child in a foster family home when such care is necessary. (S. Rep. No. 165, 87th Cong., 1st Sess. (1961) U.S. Cong. & Adm. News, V. 2, 1721)

The Senate Committee noted that while federal funds available through child welfare services to states under Title V were being used for foster care of children to a limited extent, a lack of financial resources had hindered the development of the most suitable care for children who had to be cared for outside their own home. *Id.* As a result, the new bill creating the AFDC-FC program allowed the states the option of bringing needy dependent children under the federally aided program, where a court of competent jurisdiction found that the children were not receiving proper care and protection in the home of their parents or relatives. In explaining the new provision, the Senate Committee stated:

> The foster care provisions in your committee's bill have been designed, insofar as possible, to safeguard the rights of the child and his parents or relatives. No one takes lightly the severance, even for a brief period, of the ties between a child and a parent, or somebody closely related to him. *At the same time,* an effort has been made to write into the law provisions which would stimulate and assist the States in the *protection and*

> *care of children.* (S. Rep. 165, 87th Cong., 1st Sess. (1961) U.S. Cong. & Adm. News, V. 2, 1722) (emphasis added)

Thus, while Congress recognized that the strengthening of family ties is indeed important, the statement quoted above also reflected that Congress' paramount purpose was to "assist the States in the protection and care of children." The statement regarding the safeguarding of the rights of a child or his relatives refers directly to certain precautions contained in §408(f), to which the states would have to comply if they wished to take advantage of the new foster care program. As previously shown, among these are provisions for periodic review of the necessity for the child's being in a foster family home or child-care institution; for assurance that the child is receiving proper care in the foster home; and for making possible services designed to improve the conditions in the home from which the child was removed, or to otherwise make possible his being placed in the home of a relative. It is obvious from § 408(f) that once a child is returned to his parents or otherwise placed in the home of a relative, he is no longer considered to be receiving foster care.

The new provisions for foster care became a permanent feature of the federal welfare law in 1962. In summarizing the various components of the AFDC program, the Senate Committee noted at that time:

> Prior to present temporary provision which will expire June 30, 1962, no Federal participation was authorized for children in foster care since program was limited to children living in home of a parent or a relative of the degree noted above. (Hearings Before Sess., on H.R. 10606, Public Assistance Act of 1962, p. 16).

In commenting on the desirable features of the foster care program, the Senate Committee noted in its 1962 report that the foster care program gave "the States an alternative to leaving the children in unsuitable homes or caring for them elsewhere without Federal participation in the cost." S. Rep. No. 1589, 87th Cong., 2d Sess. (1962) U.S. Cong. & Adm. News, V. 1, 1954.

Testimony offered by advocates of the foster care provisions likewise demonstrates that the § 408 foster care program, as popularly understood, provided coverage only for those children living with persons unrelated to them. As noted in the recommendations of the Ad Hoc Committee on Public Welfare appointed to serve the Secretary of Health, Education and Welfare:

> The Amendment to title IV which provides payments to children in foster homes is a significant departure from the earlier exclusive stress in this program on children living with parents or relatives. (Hearings before Committee on Finance, U.S. Senate, 87th Cong., 1st Sess., on H.R. 10606, Public Assistance Act of 1962, p. 83.)

Even more significantly, the Welfare Committee of the National Association of County Officials noted:

> In our opinion, a needy child in a foster home is equally as deserving and needy as one of an unemployed parent or one who has a parent *or relative* to reside with, thereby making him eligible for ADC aid. (Id. at 344) (emphasis added).

In 1967, Congress amended the foster care provision to provide more favorable federal matching, and to broaden eligibility for foster care for children removed from an unsuitable home by court order. (S. Rep. No. 744, 90th Cong., 1st Sess. (1967) U.S. Cong. & Adm. News, V. 2, 2837-38). The broadened eligibility resulted from the removal

by Congress of the restriction that in order for a state to receive any federal matching funds, the children must have been recipients of AFDC when the court issues its order. Comments made by the Senate Committee describing the new basis for eligibility, which is now contained in § 408 (a), again reflect the Congressional intent to distinguish between foster care and related care:

> There is some evidence that courts may be reluctant to place a child in foster care because Federal funds are not available (and the cost of the care must come out of local funds in many areas) unless the child is *in the home of a specified relative* [who is receiving AFDC payments on behalf of the child]. The proposed change would make the cost of caring for children in foster care subject to Federal sharing if the child has been placed in foster care by a court order (if the child is removed from the home of a relative as a result of judicial determination that continuation in such home would be contrary to his welfare) and if the child would have been eligible for aid under the AFDC program if an application had been made on his behalf. (S. Rep. No. 744, 90th Cong., 1st Sess. (1967) U.S. Cong. & Adm. News, V. 2, 3001) (emphasis added).

Clearly, if foster care placement was viewed as placement with a relative, the courts would not have hesitated to place a child in foster care, since federal funds would have been available. Instead, the courts' reluctance stemmed from the fact that foster care placement meant placement in unrelated homes, with the consequent loss of federal assistance. In giving the courts a welcome option under the § 408 foster care program, Congress was obviously concerned with the welfare and economic necessities of needy children placed with unrelated persons.

All of the foregoing forcefully demonstrates that the legislative history in addition to the plain meaning of the Social Security Act indicate that Congress intended that

§ 406 provide assistance only for needy children living with specified relatives while § 408 provide assistance only for needy children living with non-relatives. It is respectfully submitted that since the Illinois scheme simply parallels the federal one, it cannot be found that Illinois' treatment of relatives caring for needy children is incompatible with the Social Security Act.

C.

The Position Taken By The Department Of Health, Education And Welfare In This Case Is Contrary To Federal Law And Should Not Be Followed.

The position of HEW is formulated in the Program Instruction APA-PI-75-9, issued by HEW on October 25, 1974. (A. 48-50) This Program Instruction states that "[w]hen a child has been removed from his home by judicial determination and is placed in foster care under the various conditions specified . . ., the foster care rate of payment prevails regardless of whether or not the foster care home is operated by a relative." (A. 49) The Solicitor General of the United States filed a brief on behalf of HEW, essentially adopting this position. (A. 51-56)

While the Court regularly resorts for guidance to the rulings, interpretations and opinions of the agency responsible for the administration of the Social Security Act, the Court has stated that it will not accept HEW's interpretations which are inconsistent with the federal statute. *Townsend* v. *Swank*, 404 U.S. 282, 286, 30 L. Ed. 2d 448, 453 (1971); *King* v. *Smith*, 392 U.S. 309, 333, 20 L. Ed. 2d 1118, 1134 (1968). The instant case presents such a situation in which the HEW position should not be followed.

The position taken by HEW in its Program Instruction and *amicus* brief to the Supreme Court is by no means its

first stand on the issue of AFDC-FC eligibility. In response to an inquiry from the Illinois Department of Public Aid asking whether federal foster care funds were available for relatives specified in Section 406(a), HEW stated in a letter written in 1971 that:

> Federal participation would not be available in such payments. Title IV of the Federal Act distinguishes between AFDC and AFDC Foster Care by providing (1) for assistance in behalf of needy children living with specified relatives and (2) for assistance under specified circumstances on behalf of children removed from the home of a specified relative and placed in a foster family home or child-care institution.

The entire letter is reproduced in the Supplement at page S-26. It is readily apparent that the recent position of HEW expressed in the Program Instruction and taken in this case directly contravenes its previously expressed policy regarding § 408. Agency interpretations which conflict with earlier pronouncements rendered closer to the enactment of a particular statute should be given little weight. *General Electric Co.* v. *Gilbert*, 429 U.S. 125, 50 L. Ed. 2d 343, 358-59 (1976). It should be noted that § 408 has not been amended since 1968, so that the change in HEW's policy cannot be explained on that basis. HEW's failure to arrive at a consistent policy certainly minimizes any weight which its most recent interpretation might carry.

Furthermore, HEW's revised policy does not derive support from its own published regulations, which, again, have not been amended since the issuance of the 1974 Program Instruction. Rather, HEW's official regulations indicate a distinction between AFDC and AFDC-FC in that parents and relatives are eligible for AFDC assistance while any other individual and voluntary institutions are eligible for

AFDC-FC assistance. For example, 45 C.F.R. § 233.90 (c)(1)(v)(A)(1) dealing with the AFDC program, provides:

> (c) *Federal financial participation.* (1) Federal financial participation under title IV-A of the Social Security Act in payments with respect to a "dependent child", as defined in section 406(a) of the Act, is available within the following interpretations:
>
> • • •
>
> (v) *"Living with [a specified relative] in a place of residence maintained • • • as his • • • own home."* (A) A child may be considered to meet the requirement of living with one of the relatives specified in the Act if his home is with a parent or a person in one of the following groups:
>
> (1) Any blood relative, including those of half-blood, and including first cousins, nephews, or nieces, and persons of preceding generations as denoted by prefixes of grand, great, or great-great.

Especially significant, however, is § 233.90(c)(1)(v)(B) (1) and (2):

> (B) A home is the family setting maintained or in process of being established, as evidenced by assumption and continuation of responsibility for day to day care of the child by the relative with whom the child is living. A home exists so long as the relative exercises responsibility for the care and control of the child, even though either the child or the relative is temporarily absent from the customary family setting. *Within this interpretation, the child is considered to be "living with" his relative even though*
>
> (1) *He is under the jurisdiction of the court (e.g., receiving probation services or protective supervision); or*

> (2) *Legal custody is held by an agency that does not have physical possession of the child.* (emphasis added)

This regulation has direct application to the instant case, because the minor plaintiffs are living with a specified relative and are thus eligible for AFDC pursuant to § 406 even though they are under the court's supervision and are in the legal custody of the Department of Children and Family Services. Moreover, in delineating the extent of federal financial participation in the AFDC program, § 233.90(c)(2)(i) and (iii) provide:

> (c) *Federal financial participation.*
>
> • • •
>
> (2) Federal financial participation is available in:
>
> (i) Initial payments made on behalf of a child who goes to live with a relative specified in section 406(a)(1) of the Social Security Act within 30 days of the receipt of the first payment, provided payments are not made for a concurrent period for the same child in the home of another relative or as AFDC-FC;
>
> • • •
>
> (iii) Payments made for the entire month in the course of which a child leaves the home of a specified relative, provided payments are not made for a concurrent period for the same child in the home of another relative or as AFDC-FC;

It is obvious from a fair reading of this section that the AFDC program provides for care of chidren living with relatives and that the AFDC-FC provides assistance in situations not involving relatives.

This distinction is further manifested in HEW's regulations established pursuant to the AFDC-FC program. Under 45 C.F.R. § 233.110(a)(2), the state foster care plan submitted under the Social Security Act must:

(2) Provide for development of a plan for each child described in subparagraph (1) of this paragraph, so that:

(i) He will be placed in a foster family home or a child care institution in accordance with his needs;

(ii) His need for and the appropriateness of his care and services in such placement will be reviewed not less frequently than every 6 months;

(iii) Services will be provided to improve the conditions in the home [of the parent or relative] from which he was removed or to make possible his placement in the home of another relative *under the State's AFDC plan.* (See § 220.19 of this chapter.) (emphasis added)

45 C.F.R. § 220.19 states:

Effective July 1, 1969, services must be provided for children receiving aid in the form of foster care under title IV—part A, to:

(a) Assure placement appropriate to the needs of each child.

(b) Assure that the child receives proper care in such placement.

(c) Determine continued appropriateness of and need for placement through periodic reviews at least annually.

(d) Improve the conditions in the home from which the child was removed, so that the child may be returned to his own home, *or otherwise plan for the placement of the child in the home of other relatives,* adoptive home *or continued foster care,* as appropriate.

(e) Work with other public agencies that have responsibility for the placement and care of any such children to assure that these agencies carry out their responsibilities in accordance with their agreement with the State agency administering or supervising the administration of AFDC. (emphasis added)

The clear import of these regulations is not only that foster care constitutes temporary care, but that foster care will terminate whenever the child can be returned to the home of a relative from which he was removed or placed in the home of another relative under the AFDC program. It would, of course, be nonsensical to terminate foster care and place the child with another relative, when conditions in the original relative's home cannot be improved, if the person providing care under the AFDC-FC program is related to the child. Therefore, the regulations adopted by HEW dictate the sound conclusion that recipients of aid under the AFDC-FC program cannot be related to the dependent children for whom they care.

In short, both the Social Security Act and the official HEW regulations demonstrate that parents and related persons are eligible for benefits under AFDC, while any other individuals or child-care institutions are eligible for assistance under the AFDC-FC program. The recent policy statement of HEW, which attempts to eliminate this crucial distinction is incorrect and should not be followed by this Honorable Court.

It is respectfully submitted that for all of the foregoing reasons the Illinois statutory foster care scheme is consistent with the purpose and meaning of the Social Security Act and cannot, therefore, violate the supremacy clause of the United States Constitution.

CONCLUSION

For the foregoing reasons, Defendants-Appellants respectfully urge this Honorable Court to reverse the judgment of the court of appeals which enjoined the enforcement of the Illinois statutes insofar as they exclude persons related to foster children from eligibility under the foster care welfare program, on the ground that these statutes violate the Social Security Act and the supremacy clause of the United States Constitution.

Respectfully submitted,

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SUPPLEMENT

42 U.S.C. § 601:

§ 601. Authorization of appropriations

For the purpose of encouraging the care of dependent children in their own homes or in the homes of relatives by enabling each State to furnish financial assistant and rehabilitation and other services, as far as practicable under the conditions in such State, to needy dependent children and the parents or relatives with whom they are living to help maintain and strengthen family life and to help such parents or relatives to attain or retain capability for the maximum self-support and personal independence consistent with the maintenance of continuing parental care and protection, there is authorized to be appropriated for each fiscal year a sum sufficient to carry out the purposes of this part. The sums made available under this section shall be used for making payments to States which have submitted, and had approved by the Secretary, State plans for aid and services to needy families with children.

Aug. 14, 1935, c. 531, Title IV, § 401, 49 Stat. 627; 1946 Reorg. Plan No. 2, § 4, eff. July 16, 1946, 11 F.R. 7873, 60 Stat. 1095; 1953 Reorg. Plan No. 1, §§ 5, 8, eff. Apr. 11, 1953, 18 F.R. 2053, 67 Stat. 631; Aug. 1, 1956, c. 836, Title III, § 312(a), 70 Stat. 848; July 25, 1962, Pub. L. 87-543, Title I, § 104(a)(4), (c)(2), 76 Stat. 185, 186; Jan. 2, 1968, Pub. L. 90-248, Title II, § 241(b)(1), 81 Stat. 916.

42 U.S.C. § 602(a) provides in pertinent part:

§ 602. State plans for aid and services to needy families with children; contents; approval by Secretary

(a) A State plan for aid and services to needy families with children must

• • •

(7) except as may be otherwise provided in clause (8), provide that the State agency shall, in determining need, take into consideration any other income and resources of any child or relative claiming aid to families with dependent children, or of any other individual (living in the same home as such child and relative) whose needs the State determines should be considered in determining the need of the child or relative claiming such aid, as well as any expenses reasonably attributable to the earning of any such income;

• • •

(19) provide—

(A) that every individual, as a condition of eligibility for aid under this part, shall register for manpower services, training, and employment as provided by regulations of the Secretary of Labor, unless such individual is—

(i) a child who is under the age 16 or attending school full time;

(ii) a person who is ill, incapacitated, or of advanced age;

(iii) a person so remote from a work incentive project that his effective participation is precluded;

(iv) a person whose presence in the home is required because of illness or incapacity of another member of the household;

(v) a mother or other relative of a child under the age of six who is caring for the child; or

(vi) the mother or other female caretaker of a child, if the father or another adult male relative is in the home and not excluded by clause (i),

(ii), (iii), or (iv) of this subparagraph (unless he has failed to register as required by this Subparagraph, or has been found by the Secretary of Labor under section 633(g) of this title to have refused without good cause to participate under a work incentive program or accept employment as described in subparagraph (F) of this paragraph);

and that any individual referred to in clause (v) shall be advised of her option to register, if she so desires, pursuant to this paragraph, and shall be informed of the child care services (if any) which will be available to her in the event she should decide so to register;

• • •

(20) effective July 1, 1969, provide for aid to families with dependent children in the form of foster care in accordance with section 608 of this title:

42 U.S.C. § 603(a)(1)(B):

§ 603. Payment to States; computation of amounts; Federal share of assistance payments; social and supportive services; appropriation; family planning services and supplies; reduction of amounts

(a) From the sums appropriated therefor, the Secretary of the Treasury shall (subject to Section 1320b of this title) pay to each State which has an approved plan for aid and services to needy families with children, for each quarter, beginning with the quarter commencing October 1, 1958—

(1) in the case of any State other than Puerto Rico, the Virgin Islands, and Guam, an amount equal to the sum of the following proportions of the total amounts expended during such quarter as aid to families with dependant children under the State plan (including expenditures for premiums under

part B of subchapter XVIII of this chapter for individuals who are recipients of money payments under such plan and other insurance premiums for medical or any other type of remedial care or the cost thereof)—

• • •

(B) the Federal percentage of the amount by which such expenditures exceed the maximum which may be counted under clause (A), not counting so much of any expenditure with respect to any month as exceeds (i) the product of $32 multiplied by the total number of recipients of aid to families with dependent children (other than such aid in the form of foster care) for such month, plus (ii) the product of $100 multiplied by the total number of recipients of aid to families with dependent children in the form of foster care for such month:

42 U.S.C. § 605:

§ 605. Use of payments for benefit of children

Whenever the State agency has reason to believe that any payments of aid to families with dependent children made with respect to a child are not being or may not be used in the best interests of the child, the State agency may provide for such counseling and guidance services with respect to the use of such payments and the management of other funds by the relative receiving such payments as it deems advisable in order to assure use of such payments in the best interests of such child, and may provide for advising such relative that continued failure to so use such payments will result in substitution therefor of protective payments as provided under section 606(b)(2) of this title, or in seeking appointment of a guardian or legal representative as provided in section 1311 of this title, or in the imposition of criminal or civil penalties authorized under State law if it is determined by a

court of competent jurisdiction that such relative is not using or has not used for the benefit of the child any such payments made for that purpose; and the provision of such services or advice by the State agency (or the taking of the action specified in such advice) shall not serve as a basis for withholding funds from such State under section 604 of this title and shall not prevent such payments with respect to such child from being considered aid to families with dependent children.

Aug. 14, 1935, c. 531, Title IV, § 405, 49 Stat. 629; July 25, 1962, Pub. L. 87-543, Title I, § 107(a), 76 Stat. 188.

42 U.S.C. § 606:

§ 606. Definitions

When used in this part—

(a) The term "dependent child" means a needy child (1) who has been deprived of parental support or care by reason of the death, continued absence from the home, or physical or mental incapacity of a parent, and who is living with his father, mother, grandfather, grandmother, brother, sister, stepfather, stepmother, stepbrother, stepsister, uncle, aunt, first cousin, nephew, or niece, in a place of residence maintained by one or more of such relatives as his or their own home, and (2) who is (A) under the age of eighteen, or (B) under the age of twenty-one and (as determined by the State in accordance with standards prescribed by the Secretary) a student regularly attending a school, college, or university, or regularly attending a course of vocational or technical training designed to fit him for gainful employment;

(b) The term "aid to families with dependent children" means money payments with respect to, or (if provided in or after the third month before

the month in which the recipient makes application for aid) medical care in behalf of or any type of remedial care recognized under State law in behalf of, a dependent child or dependent children, and includes (1) money payments or medical care or any type of remedial care recognized under State law to meet the needs of the relative with whom any dependent child is living (and the spouse of such relative if living with him and if such relative is the child's parent and the child is a dependent child by reason of the physical or mental incapacity of a parent or is a dependent child under section 607 of this title, and (2) payments with respect to any dependent child (including payments to meet the needs of the relative, and the relative's spouse, with whom such child is living, and the needs of any other individual living in the same home if such needs are taken into account in making the determination under section 602(a)(7) of this title) which do not meet the preceding requirements of this subsection, but which would meet such requirements except that such payments are made to another individual who (as determined in accordance with standards prescribed by the Secretary) is interested in or concerned with the welfare of such child or relative, or are made on behalf of such child or relative directly to a person furnishing food, living accommodations, or other goods, services, or items to or for such child, relative, or other individual, but only with respect to a State whose State plan approved under section 602 of this title includes provision for—

(A) determination by the State agency that the relative of the child with respect to whom such payments are made has such inability to manage funds that making payments to him would be contrary to the welfare of the child and, therefore, it is necessary to provide such aid with respect to such child and relative through payments described in this clause (2);

(B) undertaking and continuing special efforts to develop greater ability on the part of the relative to manage funds in such manner as to protect the welfare of the family;

(C) periodic review by such State agency of the determination under clause (A) to ascertain whether conditions justifying such determination still exist, with provision for termination of such payments if they do not and for seeking judicial appointment of a guardian or other legal representative, as described in section 1311 of this title, if and when it appears that the need for such payments is continuing, or is likely to continue, beyond a period specified by the Secretary;

(D) aid in the form of foster home care in behalf of children described in section 608(a) of this title; and

(E) opportunity for a fair hearing before the State agency on the determination referred to in clause (A) for any individual with respect to whom it is made;

(c) The term "relative with whom any dependent child is living" means the individual who is one of the relatives specified in subsection (a) of this section and with whom such child is living (within the meaning of such subsection) in a place of residence maintained by such individual (himself or together with any one or more of the other relatives so specified) as his (or their) own home.

(d) The term "family services" means services to a family or any member thereof for the purpose of preserving, rehabilitating, reuniting, or strengthening the family, and such other services as will assist members of a family to attain or retain capability for the maximum self-support and personal independence.

(e)(1) The term "emergency assistance to needy families with children" means any of the following, furnished for a period not in excess of 30 days in any 12-month period, in the case of a needy child under the age of 21 who is (or, within such period as may be specified by the Secretary, has been) living with any of the relatives specified in subsection (a)(1) of this section in a place of residence maintained by one or more of such relatives as his or their own home, but only where such child is without available resources, the payments, care, or services involved are necessary to avoid destitution of such child or to provide living arrangements in a home for such child, and such destitution or need for living arrangements did not arise because such child or relative refused without good cause to accept employment or training for employment—

(A) money payments, payments in kind, or such other payments as the State agency may specify with respect to, or medical care or any other type of remedial care recognized under State law on behalf of, such child or any other member of the household in which he is living, and

(B) such services as may be specified by the Secretary;

but only with respect to a State whose State plan approved under section 602 of this title includes provision for such assistance.

(2) Emergency assistance as authorized under paragraph (1) may be provided under the conditions specified in such paragraph to migrant workers with families in the State or in such part or parts thereof as the State shall designate.

Aug. 14, 1935, c. 531, Title IV, § 406, 49 Stat. 629; Aug. 10, 1939, c. 666, Title IV, § 403, 53 Stat. 1380; Aug. 28, 1950, c. 809, Title III, Pt. 2, § 323(a), 64 Stat. 551; Aug. 1, 1956, c. 836, Title III, §§ 321, 322,

351(b), 70 Stat. 850, 855; July 25, 1962, Pub. L. 87-543, Title I, §§ 104(a)(3)(D), 108(a), 109, 152, 156(b), 76 Stat. 185, 189, 190, 206, 207; Oct. 13, 1964, Pub. L. 88-641, § 2(a), 78 Stat. 1042; July 30, 1965, Pub. L. 89-97, Title IV, § 409, 79 Stat. 422; Jan. 2, 1968, Pub. L. 90-248, Title II, §§ 201(f), 206(b), 207 (a), 241 (b)(5), 81 Stat. 880, 893, 916.

42 U.S.C. § 607 provides in pertinent part:

§ 607. Dependent children of unemployed fathers; definition

(a) The term "dependent child" shall, notwithstanding section 606(a) of this title, include a needy child who meets the requirements of section 606(a)(2) of this title, who has been deprived of parental support or care by reason of the unemployment (as determined in accordance with standards prescribed by the Secretary) of his father, and who is living with any of the relatives specified in section 606(a)(1) of this title in a place of residence maintained by one or more of such relatives as his (or their) own home.

42 U.S.C. § 608:

§ 608. Payment to States for foster home care of dependent children; definitions

Effective for the period beginning May 1, 1961—

(a) the term "dependent child" shall, notwithstanding section 606(a) of this title, also include a child (1) who would meet the requirements of such section 606(a) or of section 607 of this title except for his removal after April 30, 1961, from the home of a relative (specified in such section 606(a)) as a result of a judicial determination to the effect that continuation therein would be contrary to the welfare of such child, (2) whose placement and care are the responsibility of (A) the State or local

agency administering the State plan approved under section 602 of this title, or (B) any other public agency with whom the State agency administering or supervising the administration of such State plan has made an agreement which is still in effect and which includes provision for assuring development of a plan, satisfactory to such State agency, for such child as provided in paragraph (f)(1) and such other provisions as may be necessary to assure accomplishment of the objectives of the State plan approved under section 602 of this title, (3) who has been placed in a foster family home or child-care institution as a result of such determination, and (4) who (A) received aid under such State plan in or for the month in which court proceedings leading to such determination were initiated, or (B)(i) would have received such aid in or for such month if application had been made therefor, or (ii) in the case of a child who had been living with a relative specified in section 606(a) of this title within 6 months prior to the month in which such proceedings were initiated, would have received such aid in or for such month if in such month he had been living with (and removed from the home of) such a relative and application had been made therefor;

(b) the term "aid to families with dependent children" shall, notwithstanding section 606(b) of this title, include also foster care in behalf of a child described in paragraph (a) of this section—

(1) in the foster family home of any individual, whether the payment therefor is made to such individual or to a public or nonprofit private child-placement or child-care agency; or

(2) in a child-care institution, whether the payment therefor is made to such institution or to a public or nonprofit private child-placement or child-care agency, but subject to limitations pre-

scribed by the Secretary with a view to including as "aid to families with dependent children" in the case of such foster care in such institutions only those items which are included in such term in the case of foster care in the foster family home of an individual.

(c) the number of individuals counted under clause (A) of section 603(a)(1) of this title for any month shall include individuals (not otherwise included under such clause) with respect to whom expenditures were made in such month as aid to families with dependent children in the form of foster care; and

(d) services described in paragraph (f)(2) of this section shall be considered as part of the administration of the State plan for purposes of section 603(a)(3) of this title;

but only with respect to a State whose State plan approved under section 602 of this title—

(e) includes aid for any child described in paragraph (a) of this section, and

(f) includes provision for (1) development of a plan for each such child (including periodic review of the necessity for the child's being in a foster family home or child-care institution) to assure that he receives proper care and that services are provided which are designed to improve the conditions in the home from which he was removed or to otherwise make possible his being placed in the home of a relative specified in section 606(a) of this title, and (2) use by the State or local agency administering the State plan, to the maximum extent practicable, in placing such a child in a foster family home or child-care institution, of the services of employees, of the State public-welfare agency referred to in section 722(a) of this title (relating to allotments to States for child welfare services under

sections 721 to 728 of this title) or of any local agency participating in the administration of the plan referred to in such section, who perform functions in the administration of such a plan.

For purposes of this section, the term "foster family home" means a foster family home for children which is licensed by the State in which it is situated or has been approved, by the agency of such State responsible for licensing homes of this type, as meeting the standards established for such licensing; and the term "child-care institution" means a nonprofit private child-care institution which is licensed by the State in which it is situated or has been approved, by the agency of such State responsible for licensing or approval of institutions of this type, as meeting the standards established for such licensing.

Aug. 14, 1935, c. 531, Title IV, § 408, as added May 8, 1961, Pub. L. 87-31, § 2, 75 Stat. 76, and amended July 25, 1962, Pub. L. 87-543, Title I, §§ 101(b)(2)(D), 104(a)(3)(F), (G), 131(b), 135(a)-(d), 155(a), 76 Stat. 180, 185, 193, 196, 197, 207; Jan. 2, 1968, Pub. L. 90-248, Title II, §§ 201 (e)(4), 205(c), 81 Stat. 880, 892.

45 C.F.R. § 220.19:

§ 220.19 Foster care services

Effective July 1, 1969, services must be provided for children receiving aid in the form of foster care under title IV—part A, to:

(a) Assure placement appropriate to the needs of each child.

(b) Assure that the child receives proper care in such placement.

(c) Determine continued appropriateness of and need for placement through periodic reviews, at least annually.

(d) Improve the conditions in the home from which the child was removed, so that the child may be returned to his own home, or otherwise plan for the placement of the child in the home of other relatives, adoptive home or continued foster care, as appropriate.

(e) Work with other public agencies that have responsibility for the placement and care of any such children to assure that these agencies carry out their responsibilities in accordance with their agreement with the State agency administering or supervising the administration of AFDC.

45 C.F.R. § 233.90(c)(1)(v):

§ 233.90 Factors specific to AFDC.

* * *

(c) *Federal financial participation.* (1) Federal financial participation under title IV-A of the Social Security Act in payments with respect to a "dependent child", as defined in section 406(a) of the Act, is available within the following interpretations:

(v) *"Living with [a specified relative] in a place of residence maintained * * * as his * * * own home".*

(A) A child may be considered to meet the requirement of living with one of the relatives specified in the Act if his home is with a parent or a person in one of the following groups:

(1) Any blood relative, including those of half-blood, and including first cousins, nephews, or nieces, and persons of preceding generations as denoted by prefixes of grand, great, or great-great.

(2) Stepfathers, stepmother, stepbrother, and stepsister.

(3) Persons who legally adopt a child or his parent as well as the natural and other legally

adopted children of such persons, and other relatives of the adoptive parents in accordance with State law.

(4) Spouses of any persons named in the above groups even after the marriage is terminated by death or divorce.

(B) A home is the family setting maintained or in process of being established, as evidenced by assumption and continuation of responsibility for day to day care of the child by the relative with whom the child is living. A home exists so long as the relative exercises responsibility for the care and control of the child, even though either the child or the relative is temporarily absent from the customary family setting. Within this interpretation, the child is considered to be "living with" his relative even though

(1) He is under the jurisdiction of the court (e.g., receiving probation services or protective supervision); or

(2) Legal custody is held by an agency that does not have physical possession of the child.

45 C.F.R. § 233.90(c)(2):

• • •

§ 233.90 Factors specific to AFDC.

(c) *Federal financial participation.*

• • •

(2) Federal financial participation is available in:

(i) Initial payments made on behalf of a child who goes to live with a relative specified in section 406(a)(1) of the Social Security Act within 30 days of the receipt of the first payment, provided payments are not made for a concurrent period for the same child in the home of another relative or as AFDC-FC;

(ii) Payments with respect to an unborn child when the fact of pregnancy has been determined by medical diagnosis;

(iii) Payments made for the entire month in the course of which a child leaves the home of a specified relative, provided payments are not made for a concurrent period for the same child in the home of another relative or as AFDC-FC; and

(iv) Payments made to persons acting for relatives specified in section 406(a)(1) of the Act in emergency situations that deprive the child of the care of the relative through whom he has been receiving aid, for a temporary period necessary to make and carry out plans for the child's continuing care and support.

45 C.F.R. § 233.110:

§ 233.110. AFDC foster care

(a) *State plan requirements.* A State plan under title IV-A of the Social Security Act must:

(1) Provide that aid will be given in the form of foster care for each otherwise eligible child:

(i) Who was removed after April 30, 1961, from the home of a relative specified in the AFDC plan, as a result of a judicial determination that continuance in the home of the relative would be contrary to his welfare, for any reason, and who has been placed in foster care as a result of such determination; and

(ii) (a) Who, in or for the month in which that court action was initiated, was receiving AFDC, or would have received AFDC if application had been made, or

(b) Who lived with a relative specified in the AFDC plan within 6 months prior to the month in which that court action was initiated, and who would have received AFDC in or for such month

if in such month he had been living with (and removed from the home of) such a relative and application had been made for him; and

(iii) Whose placement and care are the responsibility of the State agency administering or supervising the administration of the AFDC plan, or, if the State so elects, are the responsibility of any other public agency, or type or types of public agencies specified in the plan, with whom the State agency has a currently effective agreement that provides for development of a plan satisfactory to the State agency for AFDC-FC children in accordance with subparagraph (2) of this paragraph and that contains other provisions necessary to achieve the objectives of the State's AFDC plan.

(2) Provide for development of a plan for each child described in subparagraph (1) of this paragraph, so that:

(i) He will be placed in a foster family home or a child care institution in accordance with his needs;

(ii) His need for and the appropriateness of his care and services in such placement will be reviewed not less frequently than every 6 months;

(iii) Services will be provided to improve the conditions in the home from which he was removed or to make possible his placement in the home of another relative under the State's AFDC plan. (See § 220.19 of this chapter.)

(3) Provide that maximum use will be made of the services of employees of the State public welfare agency responsible for the plan for child-welfare services under title IV-B of the Act or of any local agency participating in the administration of such plan.

(4) Specify:

(i) In what types of child care institutions (private nonprofit, or public, or both), in addition to foster family homes, placement will be made; and

(ii) Whether payments will be made to foster homes and institutions only or also to other agencies.

(5) Provide that there will be specific criteria for determining the amount of payment for foster care in foster family homes and in child care institutions. In establishing rates of payment to institutions, only those items included for care in foster family homes will be included, and overhead costs of the institution will be excluded.

Under the requirements of this paragraph, provision must be made for both foster family care and institutional care in accordance with the individual child's needs; public institutions may be used, without Federal financial participation, to discharge the institutional obligation in whole or in part; and the use of institutions outside the State will also meet the requirement for the provision of institutional care.

(b) *Federal financial participation.* (1) Federal financial participation is available, effective January 1, 1968, in AFDC-FC payments not to exceed an average of $100 per month per recipient, made on behalf of children as specified in section 403 of the Social Security Act, who are included in the approved State AFDC plan and who are placed in a foster family home, or nonprofit private child-care institution, licensed or approved by the agency which is responsible for licensing or approval of such facilities in the State where it is situated. The maximum of $100 average per month per recipient may be disregarded when the State claims Federal funds under the provisions of section 1118 of the Act.

(2) Federal financial participation is available in AFDC-FC payments made to an individual providing care in a foster family home, to a private nonprofit child care institution, or to a cooperating public or nonprofit private child placement or child-care agency. [36 F.R. 3869, Feb. 27, 1971]

Ill. Rev. Stat. 1971, ch. 23, § 4-1.2:

§ 4-1.2. Living Arrangements—Parents—Relatives—Foster Care)

The child or children must (1) be living with his or their father, mother, grandfather, grandmother, brother, sister, stepfather, stepmother, stepbrother, stepsister, uncle or aunt, or other relative approved by the Illinois Department, in a place of residence maintained by one or more of such relatives as his or their own home, or (2) have been (a) removed from the home of the parents or other relatives by judicial order under the "Juvenile Court Act", approved August 5, 1965,[1] as amended, (b) placed under the guardianship of a county superintendent of public aid or the principal administrative officer in the Division of Child Welfare of the Department of Children and Family Services, and (c) under such guardianship, or other guardianship authorized prior to the effective date of this 1969 Amendatory Act, placed in a foster family home or child care institution licensed pursuant to the "Child Care Act", approved July 10, 1957, as amended,[2] or approved by that Department as meeting standards established for licensing under that Act. A child so placed in foster care who was not receiving aid under this Article in or for the month in which the court proceedings leading to that placement were initiated may qualify only if he lived in the home of his parents or other relatives at the time the proceedings were initiated, or within 6 months prior to the month of initiation, and would have received aid in and for that month if application had been made therefor.

1. Chapter 37, § 701-1 et seq.
2. Chapter 23, §§ 2301 to 2329.

The conditions of qualification herein specified shall not prejudice aid granted under this Code for foster care prior to the effective date of this 1969 Amendatory Act.

Amended by P.A. 76-1199, § 1, eff. Sept. 4, 1969.

Ill. Rev. Stat. 1971, ch. 23, § 2212.05:

§ 2212.05 Facility for child care defined]

§ 2.05 "Facility for child care" or "child care facility" means any person, group of persons, agency, association or organization, whether established for gain or otherwise, who or which receives or arranges for care or placement of one or more children, unrelated to the operator of the facility, apart from the parents, with or without the transfer of the right of custody in any facility as defined in this Act, established and maintained for the care of children.

Ill. Rev. Stat. 1971, ch. 23, § 2212.17:

§ 2212.17 Foster family home and types of homes, defined]

§ 2.17. "Foster family home" means a facility for child care in residences of families who receive no more than 8 children unrelated to them, unless all the children are of common parentage, for the purpose of providing family care and training for the children on a full-time basis. The family's own children, under 18 years of age, shall be included in determining the maximum number of children served. The term "foster family home" includes homes receiving children from any State-operated institution for child care; or from any agency established by a municipality or other political subdivision of the State of Illinois au-

thorized to provide care for children outside their own homes. The types of foster family homes are defined as follows:

(a) "Boarding home" means a foster family home which receives payment for regular full-time care of a child or children.

(b) "Free home" means a foster family home other than an adoptive home which does not receive payments for the care of a child or children.

(c) "Adoptive home" means a foster family home which receives a child or children for the purpose of adopting the child or children.

(d) "Work-wage home" means a foster family home which receives a child or children who pay part or all their board by rendering some services to the family not prohibited by the Child Labor Law[1] or by standards or regulations of the Department prescribed under this Act. The child or children may receive a wage in connection with the services rendered the foster family.

(e) "Agency-supervised home" means a foster family home under the direct and regular supervision of a licensed child welfare agency, of the Department of Children and Family Services, of a circuit court, or of any other State agency which has authority to place children in child care facilities, and which receives no more than 8 children, unless of common parentage, who are placed and are regularly supervised by one of the specified agencies.

(f) "Independent home" means a foster family home, other than an adoptive home, which receives no more than 4 children, unless of common parentage, directly from parents, or other legally responsible persons, by independent arrangement and which is not subject to direct and regular supervision of a specified agency except as such supervision pertains to licensing by the Department.

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1. Chapter 48, § 31.1 et seq.

Ill. Rev. Stat. 1971, ch. 23, § 5005:

5005. Direct child welfare services.]

§ 5. To provide direct child welfare services when not available through other public or private child care or program facilities.

For purposes of this Section:

The term "children" means persons found within the State who are under the age of 18 years at the time of acceptance for service or care. The term also includes children under age 18 and children age 18 or more but under age 21 who (1) are in foster care under order of a court and (2) were, at any time before August 1, 1969, recipients of foster care under Sections 6-4 or 12-8.6 of "The Illinois Public Aid Code", approved April 11, 1967, as amended.[1]

The term "child welfare services" means public social services which supplement or substitute for parental care and supervision for the purpose of: (1) preventing or remedying or assisting in the solution of problems which may result in the neglect, abuse or exploitation of children; (2) protecting and caring for homeless, dependent or neglected children; (3) protecting and promoting the welfare of children, including the strengthening of their own families and counseling of family members; (4) providing adequate care of children away from their homes, where needed, in foster family homes or day care or other child care facilities; or (5) providing counseling for mentally retarded, physically, and socially handicapped children and their parents when not otherwise available.

The Department shall establish and maintain tax-supported child welfare services and extend and seek to improve voluntary services throughout the State, to the end that services and care shall be available on an equal basis throughout the State to the children requiring such services.

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1. Chapter 23, §§ 6-4, 12-18.6.

For the purpose of insuring effective state-wide planning, development, and utilization of resources for the day care of children, operated under various auspices, the Department is hereby designated to coordinate all day care activities for children of the State and shall:

(1) Develop a comprehensive day-care plan for the State which identifies high-priority areas and groups, relating them to available resources, and identifying the most effective approaches to the use of existing day care services. The plan shall include methods and procedures for the development of additional day care resources for children to meet the goal of reducing short-run and long-run dependency and to provide necessary enrichment and stimulation to the education of young children. Recommendation shall be made for State policy on optimum use of private and public, local, state and federal resources. A written plan shall be submitted to the Governor, annually, on January 1, and shall include an evaluation of developments over the proceeding year, including cost-benefit analyses of various arrangements.

(2) The Department shall conduct day care planning activities within the following priorities:

(a) development of voluntary day care resources wherever possible, with the provision for grants-in-aid only where demonstrated to be useful and necessary as incentives or supports;

(b) emphasis on service to children of recipients of public assistance where such service will allow training or employment of the parent toward achieving the goal of independence;

(c) maximum employment of recipients of public assistance in day care centers and day care homes, operated in conjunction with short-term work training programs;

(d) care of children from families in stress and crises whose members potentially may become, or are in danger of becoming, non-productive and dependent;

(e) expansion of family day care facilities wherever possible;

(f) location of centers in economically depressed neighborhoods, preferably in multi-service centers with cooperation of other agencies;

(g) use of existing facilities free of charge or for reasonable rental wherever possible in lieu of construction.

(3) Based on its planning activities, the Department shall actively stimulate the development of public and private resources at the local level. It shall also seek the fullest utilization of federal funds directly or indirectly available to the Department.

(4) Where appropriate, existing non-governmental agencies or associations shall be involved in planning by the Department.

The Department shall establish rules and regulations concerning its operation of programs established to meet these purposes, including but not limited to adoption, foster care, family counseling, protective services, service to unwed mothers, homemaker service, return of runaway children, and interstate services.

The Department may provide financial assistance, and shall establish rules and regulations concerning such assistance, to persons who adopt physically or mentally handicapped, older and other hard-to-place children who immediately prior to their adoption were legal wards of the Department. The amount of assistance may vary, depending upon the needs of the child and the adoptive parents, but must be less than the monthly cost of care of the child in a foster home. Special purpose grants are allowed where the child requires special service but such costs may not exceed

the amounts which similar services would cost the Department if it were to provide or secure them as guardian of the child.

The Department shall accept for care and training any child who has been adjudicated neglected or dependent committed to it pursuant to the "Juvenile Court Act".[2] The Department may, at its discretion except for those children also adjudicated neglected or dependent, accept for care and training any child who has been adjudicated delinquent or as a minor in need of supervision, under the "Juvenile Court Act", but no such child shall be committed to the Department by any court without the approval of the Department.

The Department may assume temporary custody of any child (1) if it has received a written consent to such temporary custody signed by the parents of the child or by the parent having custody of the child if the parents are not living together or by the guardian or custodian of the child if the child is not in the custody of either parent or (2) if the child is found in the State and neither a parent, guardian nor custodian of the child can be located. The Department shall have the authority, responsibilities and duties that a legal custodian of the child would have pursuant to Section 1-12 of the "Juvenile Court Act".[3] A parent, guardian or custodian of a child in the temporary custody of the Department who would have custody of the child if he were not in the temporary custody of the Department may deliver to the Department a signed request that the Department surrender the temporary custody of the child. The Department may retain temporary custody of the child for 10 days after the receipt of the request, during which period the Department may cause to be filed a petition pursuant to the "Juvenile Court Act". If a petition is so filed, the Department shall retain temporary custody of the child until the

2. Chapter 37, § 701-1 et seq.
3. Chapter 37, § 701-12.

court orders otherwise. If a petition is not filed within the 10 day period, the child shall be surrendered to the custody of the requesting parent, guardian or custodian not later than the expiration of the 10 day period, at which time the authority and duties of the Department with respect to the temporary custody of the child shall terminate. The Department may place children under 18 years of age in licensed child care facilities when in the opinion of the Department, such placement would be for their best interest. Payment for board, clothing, care, training and supervision of any child placed in a licensed child care facility may be made by the Department, by the parents or guardians of the estates of those children, or by both the Department and the parents or guardians, except that no payments shall be made by the Department for any child placed in a licensed child care facility for board, clothing, care, training and supervision of such a child that exceed the average percapita cost of maintaining and of caring for a child in institutions for dependent or neglected children operated by the Department. However, such restriction on payments does not apply in cases where children require specialized care and treatment for problems of severe emotional disturbance, physical disability, social adjustment, or any combination thereof and suitable facilities for the placement of such children are not available at payment rates within the limitations set forth in this Section.

The Department may receive and shall use, in its entirety, for the benefit of children any gift, donation or bequest of money or other property which is received on behalf of such children, or any financial benefits to which such children are or may become entitled while under the jurisdiction or care of the Department.

Amended by P.A. 76-2041, § 1, eff. July 1, 1970; P.A. 77-1374, § 1, eff. Aug. 31, 1971.

DEPARTMENT OF HEALTH, EDUCATION,
AND WELFARE
REGION V

433 WEST VAN BUREN STREET, ROOM 712
CHICAGO, ILLINOIS 60607

March 10, 1971

SOCIAL & REHABILITATION
SERVICE

Mr. Gordon Watters, Chief
Division of Program Development
Department of Public Aid
209 West Jackson Blvd., Room 602
Chicago, Illinois 60606

Dear Mr. Watters:

This responds to your letter of October 19, 1970 asking whether Federal financial participation is available in payments under the AFDC program to relatives within the relationship specified in Section 406(a) of the Social Security Act.

Federal participation would not be available in such payments. Title IV of the Federal Act distinguishes between AFDC and AFDC Foster Care by providing (1) for assistance in behalf of needy children living with specified relatives and (2) for assistance under specified circumstances on behalf of children removed from the home of a specified relative and placed in a foster family home or child-care institution.

Even if the Federal Act permitted Federal matching, Illinois statutes seem to preclude a relative's home being considered a foster home. Section 2217.17 of State law defines a foster family home as a "facility for child care in

residences who receives no more than 8 children *unrelated* to them . . . on a fulltime basis" (emphasis supplied). This definition is consistent with the traditional concept of a foster home in the child welfare field under which there is a distinct difference between a foster home and the home of a relative.

We wish to note that relatives caring for a child for whom they have no legal responsibility cannot be held responsible for any part of that child's living expenses. Therefore, the assistance grant must include all items in the State standards for AFDC that are included when a child lives with his parents or other needy relative. Only when the non-needy relative with whom he is placed freely contributes any of the requirements, may such contribution be considered as available in determining the amount of the payment. (See Program Regulation 20-7, CFR 233.20(a)(3)(ii)(c).

We question that your manual instructions make this policy entirely clear. For example. Section 1008.6 states, "an allowance to enable the recipient to pay his share of the total rent to a relative with whom he is living requires supervisory approval related to an evaluation of the total social and economic factors." This could be interpreted to mean that budgeting shelter cost for a child living with a self-supporting relative would be an exception to the general rule. The policy undoubtedly leads workers to assume income (contribution of shelter and other joint household expenses) in AFDC cases as well as in assistance to recipients in the adult categories. It should be modified and clarified to assure that budgeting practice does not assume income that is not actually available.

Many States have established a room and board standard plus clothing and personal incidental standard allowances

for AFDC assistance to children living with self supporting relatives. This has the advantage of eliminating inquiry into the circumstances of the relative. Although such a standard might not equal the foster care rate, it would be more nearly comparable and reasonable; and it would be consistent with policy as stated in Handbook Section IV 3435.3 on the subject of AFDC children in "Homes with Relatives other than Parents." If such a standard is established it must apply in *all* cases in which children are living with non-needy relatives other than parents.

You also asked if the Department of Children and Family Services could pay a relative for care and supervision of the child recipient without affecting the AFDC grant. As long as there is no claim for Federal financial participation in such a payment and DCFS is able to make such payments under State law, no question would be raised. In effect, this would be income for the relative and not for the child.

We hope that these comments will be helpful to you in reconsideration of budgeting policy for children living with relatives other than their parents.

Sincerely yours,

/s/ EDWARD J. SIENICKI,
Acting Regional Commissioner,
SRS

FILED
JUL 17 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-742

JEROME MILLER, individually and as Director of THE DEPARTMENT OF CHILDREN AND FAMILY SERVICES and THE DEPARTMENT OF CHILDREN AND FAMILY SERVICES of the STATE OF ILLINOIS,

Appellants,

VS.

MARCEL YOUAKIM and LINDA YOUAKIM, individually and as foster parents; TIMOTHY ROBERTSON, a minor, by his sister and next friend LINDA YOUAKIM; MARY LOU ROBERTSON, a minor, by her sister and next friend LINDA YOUAKIM; LARRY ROBERTSON, a minor, by his sister and next friend LINDA YOUAKIM; and SHERRY ROBERTSON, by her sister and next friend LINDA YOUAKIM; and all others similarly situated,

Appellees.

On Appeal from the United States Court
of Appeals for the Seventh Circuit

BRIEF OF APPELLEES

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-742

JEROME MILLER, individually and as Director of THE DEPARTMENT OF CHILDREN AND FAMILY SERVICES and THE DEPARTMENT OF CHILDREN AND FAMILY SERVICES of the STATE OF ILLINOIS,

Appellants,

vs.

MARCEL YOUAKIM and LINDA YOUAKIM, individually and as foster parents; TIMOTHY ROBERTSON, a minor, by his sister and next friend LINDA YOUAKIM; MARY LOU ROBERTSON, a minor, by her sister and next friend LINDA YOUAKIM; LARRY ROBERTSON, a minor, by his sister and next friend LINDA YOUAKIM; and SHERRY ROBERTSON, by her sister and next friend LINDA YOUAKIM; and all others similarly situated,

Appellees.

On Appeal from the United States Court of Appeals for the Seventh Circuit

BRIEF OF APPELLEES

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED†

U.S. Const. art. VI, cl. 2, the Supremacy Clause**

Social Security Act of 1935, Title IV, 49 Stat. 627, as amended:

Section 401, 42 U.S.C. § 601 (1970)
Section 402(a)(10), 42 U.S.C. § 602(a)(10) (1970 & Supp. V 1975)**
Section 402(a)(19)(F), 42 U.S.C. § 602(a)(19)(F) (1970 & Supp. V 1975)**
Section 402(a)(20), 42 U.S.C. § 602(a)(20) (1970 & Supp. V 1975)
Section 403(a)(1)(B), 42 U.S.C. § 603(a)(1)(B) (1970)
Section 406(a), 42 U.S.C. § 606(a) (1970 & Supp. V 1975)
Section 408, 42 U.S.C. § 608 (1970)
Section 425, 42 U.S.C. § 625 (1970)**
45 C.F.R. § 220.19 (1976)
45 C.F.R. § 233.110 (1976)
DEPARTMENT OF HEALTH, EDUCATION AND WELFARE, PROGRAM INSTRUCTION APA PI-75-9 (October 25, 1974)*
ILL. REV. STAT. ch. 23, § 2212.05 (Supp. 1977)
ILL. REV. STAT. ch. 23, § 2212.17 (Supp. 1977)
ILL. REV. STAT. ch. 23, § 2217 (Supp. 1977)**
ILL. REV. STAT. ch. 23, § 5005 (Supp. 1977)
ILLINOIS DEPARTMENT OF CHILDREN AND FAMILY SERVICES, PLACEMENT MANUAL Ch. 3, Pt. V (IV) (1972)*
ILLINOIS DEPARTMENT OF CHILDREN AND FAMILY SERVICES, CHILD WELFARE MANUAL 2.8.2 (1976)**

† All constitutional provisions, statutes and regulations involved are reproduced in the Supplement to Brief and Argument for Appellants, except for those marked by a single asterisk, which are reproduced in the Appendix, and those marked by a double asterisk, which are reproduced in the Supplement hereto.

QUESTION PRESENTED

DOES THE ILLINOIS POLICY OF DENYING AFDC-FOSTER CARE ELIGIBILITY TO OTHERWISE ELIGIBLE FOSTER CHILDREN SOLELY BECAUSE ILLINOIS PLACES THEM IN THE HOMES OF RELATIVES VIOLATE THE SOCIAL SECURITY ACT, SECTION 408 AND THUS U.S. CONST. ART. VI, CL. 2, THE SUPREMACY CLAUSE?

STATEMENT OF THE CASE

I. THE AFDC-FOSTER CARE PROGRAM

The Aid to Families with Dependent Children-Foster Care ("AFDC-Foster Care" or "Foster Care") Program, Social Security Act, Section 408, 42 U.S.C. § 608 (1970), is one of the federal-state categorical public assistance programs under the Social Security Act of 1935, as amended (the "Act"). In 1961, when the Foster Care Program was enacted, Act of May 8, 1961, Pub. L. No. 87-31, § 2, 75 Stat. 76, participation was optional for states participating in the basic Aid to Families with Dependent Children ("AFDC") Program, Section 406, 42 U.S.C. § 606 (1970 & Supp. V 1975).[1] Since July 1, 1969, states participating in the basic AFDC program must have a Foster Care Program. Section 402(a)(20), 42 U.S.C. § 602(a)(20).

The Foster Care Program provides cash payments and specialized social services to eligible foster children. Foster children receive substantially higher money benefits than children receive under the basic AFDC program. Illinois, for example, pays from $105 to $150

[1] All citations to the United States Code are to Supp. V (1975) to the 1970 edition, unless otherwise indicated.

monthly in Foster Care on behalf of an eligible child. DEPARTMENT OF CHILDREN AND FAMILY SERVICES ("DCFS"), CHILD WELFARE MANUAL 4.1.1(B). It pays a maximum of $69 monthly for each child eligible for the basic AFDC program. ILLINOIS DEPARTMENT OF PUBLIC AID, AFDC CATEGORICAL ASSISTANCE MANUAL PR-615. Comparable differentials between Foster Care benefits and basic AFDC benefits have prevailed in all participating states since the establishment of the Foster Care Program. *See* n.13, *infra*. Moreover, under Section 408, the states must provide specialized intensive services to AFDC-Foster Care children and their parents and must assure that the foster homes in which these children live meet state qualitative licensing standards for suitable foster placements. *See* pp. 22, 27-31, *infra*. Children in the basic AFDC program are ineligible for these special services, and their homes need not meet such standards.

One of the federal eligibility requirements for the AFDC-Foster Care Program is that the otherwise eligible foster child be placed in a "foster family home." Section 408(a)(3), 42 U.S.C. § 608(a)(3) (1970). Under ILL. REV. STAT. ch. 23, §§ 2212.05, 2212.17 and 5005 (Supp. 1977), the appellant state official (the Director of the Illinois Department of Children and Family Services) and DCFS who administer the Foster Care Program in Illinois, deny Foster Care eligibility to those otherwise eligible children whom the state officials place in the home of non-legally responsible relatives of those children. Appellants contend that such a home is not a "foster family home" within the meaning of Section 408.

II. THE ROBERTSON FOSTER CHILDREN

Timothy Robertson, Mary Lou Robertson, Larry Robertson and Sherry Robertson are brothers and sisters. (A. 7-8, 58).[2] In 1969, all four children were judicially removed from their mother's home upon a finding of neglect, and made state wards. (A. 7, 10-11, 58).

As state wards, the Robertson children were the responsibility of the Illinois Department of Children and Family Services, and from 1969-1972, DCFS placed them in various homes of strangers and in child care institutions, *i.e.*, orphanages. (A. 10-11, 58). So long as the Robertson children resided in such unrelated foster homes, or in orphanages, DCFS deemed them eligible for the AFDC-Foster Care Program, and paid full AFDC-Foster Care benefits on their behalf. (A. 11, 58).

In 1972, however, DCFS decided to place Timothy in the home of Marcel Youakim and his wife Linda. (A. 11, 58). Linda Youakim is the older sister of the Robertson children. (A. 7-8, 58). Neither Marcel nor Linda Youakim was under any legal obligation to accept this placement or to support Timothy financially. *See* ILL. REV. STAT. ch. 23, § 10-2 (Supp. 1977).

Under ILL. REV. STAT. ch. 23, § 2217 (Supp. 1977) and the DCFS PLACEMENT MANUAL, ch. 3, Pt. V (IV) (1972), (A. 38), DCFS was required to assure that the Youakim home met the licensing standards established for foster

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[2] The following designations are used to refer to the Appendix and Statutory Supplements filed with this Court, in which material cited herein can be found:

"A."—Appendix
"State Supp."—Supplement to Brief and Argument for Appellants
"Appellees' Supp."—Supplement to Brief of Appellees.

family homes, as defined in ILL. REV. STAT. ch. 23, § 2212.17 (Supp. 1977), before placing Timothy there. Accordingly, DCFS officials inspected the Youakim home and approved it as meeting the standards for the care of the "foster child . . . Timothy Robertson." (A. 11, 20-23).

This approval was incorporated in a "Home Placement Agreement" which the Youakims signed. (A. 20-23). Aside from approving the Youakims' home as a foster care home, the agreement provided for periodic visits by DCFS counselors to assist the family in planning for Timothy. (A. 21). The Agreement was identical to the agreement governing licensing of and placement in AFDC-Foster Care homes maintained by non-relatives, with three exceptions: (1) The word "foster" was crossed out at some, but not all, points; (2) two references to the Youakims' relationship to the children were included; and (3) DCFS's usual promise of Foster Care benefits was deleted. (A. 12, 20-23, 58).

DCFS had placed Mary Lou in several foster homes of strangers, and in orphanages, since she had been removed from her mother's home. (A. 12, 58). After DCFS placed Timothy in the Youakims' home, DCFS employees decided that placement of Mary Lou in that home would also be appropriate. (A. 12, 58). Accordingly, they approved the Youakim home for placement of Mary Lou also, and the Youakims and DCFS entered into another Home Placement Agreement. (A. 12, 58).

At the time Timothy was placed in the Youakims' home, DCFS employees denied the Youakims AFDC-Foster Care benefits for his care, because Linda was related to him. (A. 11, 14, 58). After Mary Lou was placed in the Youakims' home, DCFS refused to make AFDC-Foster Care payments on her behalf as well. (A. 12-14, 58).

The Youakims, at the suggestion of a DCFS caseworker, applied on the children's behalf to the Illinois Department of Public Aid for basic AFDC benefits. (A. 14-15, 58). Basic AFDC benefits were granted on behalf of both children. The total amount of these benefits for both children was $123.04, over $85.00 a month less than the AFDC-Foster Care benefits that would have been paid on the children's behalf if they had been placed in the home of a non-relative. (A. 14-15, 58).

From the time of Timothy and Mary Lou's placement in their home, the Youakims personally supported these children. In doing so they incurred personal expenses substantially in excess of basic AFDC benefits they were receiving on behalf of Timothy and Mary Lou, and also in excess of the benefits they would have received had DCFS authorized Foster Care benefits. (A. 14, 58). For this reason, and because DCFS would not pay AFDC-Foster Care benefits on behalf of the remaining two Robertson children, Sherry and Larry, the Youakims were unable to accept Sherry and Larry as foster children. (A. 14, 58). Placing Larry and Sherry in the Youakim home would have reunited the four Robertson children for the first time since 1969. Larry remained in an orphanage, and Sherry in a foster family home of strangers. (A. 14, 58).

III. THE PROCEEDINGS TO DATE

The four Robertson foster children and the Youakims filed their second Amended Complaint in January, 1974. (A. 5). The action was brought under 42 U.S.C. § 1983, as a class action pursuant to FED. R. CIV. P. 23(a) and (b)(2). (A. 10). Plaintiffs ("the foster children") challenged the Illinois statutory policy denying Foster Care benefits to otherwise eligible children solely because the state placed them in homes of relatives. (A. 16-19).

The state officials moved to dismiss the complaint for failure to state a claim. (A. 41). A three-judge court certified a plaintiff class of foster children and held that "[t]he Illinois scheme does not deny plaintiffs equal protection of the laws." 374 F.Supp. 1204, 1210 (N.D. Ill. 1974).

The foster children appealed to this Court. The Jurisdictional Statement raised, for the first time, the claim that the challenged Illinois statutory policy violated Social Security Act Section 408, 42 U.S.C. § 608 (1970). This Court noted probable jurisdiction. 420 U.S. 970 (1975).

On March 21, 1976 this Court issued a *per curiam* opinion, *Youakim v. Miller*, 425 U.S. 231 (1976), vacating the decision of the three-judge court and remanding the case for consideration of the foster children's statutory claim in light of, *inter alia*, an HEW Program Instruction supporting that claim. The District Court subsequently issued a Memorandum Opinion granting the foster children's motion for summary judgment, and entered a final Judgment and Order on that Opinion. 431 F.Supp. 40 (N.D. Ill. 1976) and Jurisdictional Statement, Appendix C. The Opinion and Final Judgment, *inter alia*, (1) certified a plaintiff class of otherwise eligible foster children; and (2) declared that ILL. REV. STAT. ch. 23, §§ 2212.05, 2212.17 and 5005, insofar as they denied AFDC-Foster Care benefits and services to otherwise eligible foster children living in the homes of relatives, violated Sections 401 and 408, 42 U.S.C. §§ 601 and 608 (1970).

A unanimous Court of Appeals affirmed the Judgment of the District Court. 562 F.2d 482 (7th Cir. 1977).

The state officials filed a timely Jurisdictional Statement. This Court noted probable jurisdiction. 98 S.Ct. 1230 (1978).

SUMMARY OF ARGUMENT

I. Section 408 defines the children who are eligible for the Foster Care Program. The states are not free to restrict this federal definition of eligibility, in the absence of a clear indication that Congress meant the coverage to be optional. *Carleson v. Remillard*, 406 U.S. 598 (1972); *Townsend v. Swank*, 404 U.S. 282 (1971); *King v. Smith*, 392 U.S. 309 (1968). The constitutional foundation for this rule is U.S. CONST. art. VI, cl. 2, the Supremacy Clause. The rule's statutory foundation is Section 402(a)(10), *see Quern v. Mandley*, 46 U.S.L.W. 4594, 4598 (June 6, 1978), which applies to the Foster Care Program.

II. The Illinois statutory policy of denying Foster Care eligibility to otherwise eligible children solely because the state places them in the homes of relatives, unlawfully restricts the federal definition of eligibility in Section 408. Congress meant a foster family home to be *any* home meeting state qualitative standards for a home providing care for a foster child. Relative homes meeting such standards are included within the federal definition; the state's policy of denying Foster Care eligibility to an otherwise eligible child it places in such a home, on the grounds that such a home is not a "foster family home," Section 408(a)(3), is therefore unlawful.

A. A primary purpose of the AFDC program is to encourage the care of dependent children in their own home or in the homes of relatives, and thereby "to help maintain and strengthen family life." Section 401.

B. The overriding purpose of the Foster Care Program is to help assure that neglected and abused children removed from their own homes by state action

receive the most suitable available care outside their homes, appropriate to their special needs. For the class of neglected AFDC children judicially removed from unsuitable homes and placed in the care of the appropriate state welfare agency, Congress requires proper placement efforts, supervised by the state agency. It requires that the "foster family home" in which an eligible child is placed meet state-defined standards governing its suitability as a foster child placement. From its inception, the program has provided substantial additional cash money payments and specialized services not provided under the basic program.

C. Section 408 sets forth a statutory definition of a "foster family home":

> [T]he term "foster family home" means a foster family home for children which is licensed by the State . . . or has been approved . . . as meeting the standards established for such licensing.

If the (relative) homes in which the children here are placed meet this statutory definition, then the children here are eligible for AFDC-Foster Care.

The licensing or approval requirement was included to assure that the homes in which the state placed eligible children would meet minimum state qualitative standards. Illinois regularly places otherwise eligible foster children in the homes of relatives which must be and are, under state policy, regularly approved as meeting such standards. Therefore, in the absence of a Congressional intent simply to exclude the home of a relative of an otherwise eligible foster child from the statutory understanding of the term "foster family home," Illinois has itself brought such homes within the express statutory definition of that term, and otherwise eligible children placed in such homes within the federal definition of Foster Care eligibility.

D. Congress had no such intent to exclude the homes of relatives of otherwise eligible foster children. Section 408 and related provisions of the Act, read in light of the objects and policies of the Foster Care Program, demonstrate that Congress meant to require Foster Care coverage for an otherwise eligible foster child the state placed in *any* home meeting state qualitative standards, including the home of a child's relative.

1. The adjective "foster," whatever it modifies, commonly denotes non-parental care of a child by a relative, as well as non-relative care. Furthermore, Congress' central concern, under the Foster Care Program, with helping to assure the most suitable placement for neglected children removed from their own homes—in the context of a remedial program designed to meet these children's special needs—is convincing evidence that a restrictive definition of "foster family home" would only subvert Congress' intent.

2. Section 408(b) provides that coverage of foster care shall include care "in the foster family home of any individual."

Congress' choice of the word "any" demonstrates the absence of any intent to exclude *a priori* any class of individuals as potential foster parents (or any class of homes meeting state qualitative standards as potential "foster family home[s]").

3. "[I]n the absence of an unmistakable directive," this Court will not construe a federal statute "in a manner which runs counter to the broad goals which Congress intended it to effectuate." *FTC v. Meyer*, 390 U.S. 341, 349 (1968). In reading "foster family home" to exclude relative homes, the state attributes to Congress, in one subsection of Section 408(a), an intent to legislate *sub silentio* significantly different treatment to two classes of children identically situated as to need, in a

program structured precisely to assist the states to meet that common need for special care and protection. The state also attributes to Congress an intent to discourage family care of dependent children, the care it has always judged most suitable for them, in a program established to assist the states to provide the most suitable care to dependent neglected children judicially removed from their homes.

4. Section 402(a)(19)(F)(i) provides that if a caretaker relative refuses to cooperate in the AFDC Work Incentive Program ("WIN"), AFDC payments to her shall be terminated, but that aid for "any dependent child in the family" shall be continued in the form of protective payments or Foster Care payments under "Section 408." This provision can only have been directed at one or both of two possible situations, either of which incorporates an explicit Congressional recognition of the home of a relative as a "foster family home."

III. Coverage of children living with relatives under the Foster Care Program does not duplicate coverage available under the basic AFDC program. Eligibility for Foster Care is defined by additional eligibility criteria, and provides a distinct set of benefits and services tailored to meet the special needs of neglected, exploited, or abused wards of the state.

IV. The construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong. Here, the Department of Health, Education and Welfare's relevant interpretation of Section 408 is clear, unequivocal, and wholly supports the foster children's position.

ARGUMENT

ILLINOIS' DENIAL OF AFDC-FOSTER CARE ELIGIBILITY TO OTHERWISE ELIGIBLE FOSTER CHILDREN SOLELY BECAUSE IT PLACES THEM IN THE HOMES OF RELATIVES VIOLATES SECTION 408 OF THE SOCIAL SECURITY ACT AND THUS U.S. CONST. ART. VI, CL. 2, THE SUPREMACY CLAUSE.[3]

I.

INTRODUCTION.

Section 408 defines the children who are eligible for the Foster Care Program. The states are not free to restrict this federal definition of eligibility, in the absence of a clear indication that Congress meant the coverage to be optional. *Carleson v. Remillard*, 406 U.S. 598 (1972); *Townsend v. Swank;* 404 U.S. 282 (1971); *King v. Smith*, 392 U.S. 309 (1968). *See Burns v. Alcala*, 420 U.S. 575 (1975).[4] The constitutional foundation for this rule is U.S. CONST. ART. VI, cl. 2, the Supremacy

[3] Supreme Court Rule 15(c) provides that "only the questions set forth in the jurisdictional statement or fairly comprised therein will be considered by the court." *See Phillips Chemical Co. v. Dumas Independent School Dist.*, 361 U.S. 376, 386 (1960). Moreover, this Court ordinarily will not consider questions not raised in or decided by the Court of Appeals. *See Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 147 (1970). On remand from this Court's decision vacating the original three-judge court decision herein, neither party proceeded on the equal protection question originally presented, (A. 44, 57), and neither the District Court nor the Court of Appeals addressed that question. Appellants' Jurisdictional Statement makes no reference to this constitutional question as being presented here. For these reasons, the constitutional question originally before the Court on the first appeal is not now before it; only a statutory question is presented.

[4] "*King, Townsend*, and *Carleson* establish . . . that once the federal standard of eligibility is defined, a participating State may not deny aid to persons who come within it in the absence of a clear indication that Congress meant the coverage to be optional." *Burns v. Alcala*, 420 U.S. 575, 580 (1975).

Clause. *Carleson, Townsend, King.* The rule's statutory foundation is Section 402(a)(10), which provides that "aid to families with dependent children shall be furnished . . . to *all* eligible individuals" (emphasis added). *See Quern v. Mandley,* 46 U.S.L.W. 4594, 4598 (June 6, 1978). Since "foster care" under the Foster Care Program is defined as "aid to families with dependent children," Section 408(b), the mandate of Section 402(a)(10) applies to the Foster Care Program. Section 408(e) independently provides that federal funding of any foster care under Section 408 is predicated on the State AFDC plan "includ[ing] aid for *any* child described in paragraph (a) of this section [408]" (emphasis added). Section 408(e) is a statutory parallel to Section 402(a)(10).

The Illinois policy of denying Foster Care eligibility to otherwise eligible children, solely because the state places them in the homes of relatives, unlawfully excludes children who come within the federal definition of eligibility in Section 408. As shown *infra,* under Section 408 a foster family home is *any* home meeting state qualitative standards for a home providing care for a foster child. The home of a relative meeting such standards, such as the Youakims' home, is included within the federal definition, and the state's policy of denying Foster Care eligibility to children it places in such a home, on the grounds that such a home is not a "foster family home," Section 408(a)(3), is therefore unlawful.

There is no more persuasive evidence that section 408 defines "foster family home" and Foster Care eligibility so as to make the children here eligible, than the words Congress chose to express its intentions in Section 408 itself. *See Perry v. Commerce Loan Co.,* 383 U.S. 392, 400 (1966). Indeed, the Court of Appeals found its decision compelled by "the plain meaning of the federal

statute." *Youakim,* 562 F.2d at 486. Section 408 cannot, of course, be read in a vacuum. The meaning of a statute must be discerned by "look[ing] to the provisions of the whole law, and to its object and policy." *Philbrook v. Glodgett,* 421 U.S. 707, 713 (1975) quoting *United States v. Heirs of Boisdoré,* 49 U.S. (8 How.) 113 (1849). Here that "whole law" includes at least the immediate statutory environment in which Section 408 was enacted, as well as Section 408 itself. *See Kokoszka v. Belford,* 417 U.S. 642, 650 (1974); *King v. Smith,* 392 U.S. 309, 316-329 (1968). Thus it is appropriate to review briefly the objects and policies of the regular AFDC program, as well as of the Foster Care Program itself, before discussing why Section 408 invalidates the Illinois policy at issue. The next three sections review these objects and policies.

II.

THE OBJECTS AND POLICIES OF THE AFDC PROGRAM.

The original focus of the AFDC program was to maintain and strengthen family life by providing benefits for the support of dependent children in needy families. *Burns v. Alcala,* 420 U.S. 575, 581-82 (1975). These benefits were designed to allow mothers to remain home to care for their children; the practice of institutionalizing needy children would thereby be avoided. *Id.,* citing S. REP. No. 628, 74th Cong., 1st Sess. 16-17 (1935); H. R. REP. No. 615, 74th Cong., 1st Sess. 10 (1935).

Congress has often amended the Act to further advance the goal of preserving family life and to emphasize its importance. Assistance had originally been extended only to the dependent child. In 1950, Congress amended Section 406(b) to permit assistance to be extended to the caretaker relative as well. Act of

August 28, 1950, ch. 809, § 323, 64 Stat. 551, 42 U.S.C. § 606(b). The House Committee Report linked the amendment to the goal of preserving family life. H. R. REP. No. 1300, 81st Cong., 1st Sess. 46 (1949). The 1956 amendments to the Act, Act of August 1, 1956, ch. 836, § 312(a), 70 Stat. 848, amended Section 401 to state specifically that a primary purpose of the AFDC program was to "encourag[e] the care of dependent children in their own homes or in the homes of relatives," and thereby "help to maintain and strengthen family life."

Congress further sought to strengthen family life by establishing the AFDC-Unemployed Parent Program ("AFDC-U"), Act of May 8, 1961, Pub. L. No. 87-31, § 1, 75 Stat. 75, 42 U.S.C. § 607, in the same act which established the AFDC-Foster Care Program. Since the inception of the basic AFDC program, eligibility for benefits had been predicated on the "death, . . . absence . . . or . . . incapacity" of one or both parents. Section 406(a), 42 U.S.C. § 606(a). These eligibility criteria had created an incentive for one of the parents, usually the father, to leave the home in order to make the spouse and children eligible for benefits. In the AFDC-U Program, Congress acted to remove this incentive to family disintegration, by permitting eligibility for AFDC to be based on the unemployment of a parent. Its intent was to strengthen the family unit in the child's own home by allowing the father to remain in the home. 107 CONG. REC. 3765 (1961) (Remarks of Rep. Baldwin); 107 CONG. REC. 3768 (1961) (Remarks of Rep. McCormack); 107 CONG. REC. 3770 (1961) (Remarks of Rep. Ullman).

From the inception of the program, Congress recognized that "family life" for the child included the extended family. Section 406(a). Most eligible children lived with one or both parents. But a child whose

parents were dead or unable or unfit to care for him remained eligible for the program if non-legally responsible relatives agreed to care for him in their home. Sections 406(a), 406(c). Relatives, however, often had other obligations which precluded their undertaking such a task. As early as 1947 the Social Security Board (Bureau of Public Assistance), which then administered the AFDC program, stated:

> A child's relative, even though seemingly well-to-do, may have other obligations with prior claim on his income and resources. He may have children of his own to support; he may have assumed responsibility for the support of other needy relatives; or he may, under the necessity of securing his own future and that of his dependents, have obligated all resources above those required for his and their day-to-day responsibilities. In such circumstances a relative, even though deeply concerned for the welfare of the needy child, naturally hesitates to offer a home if by so doing he must jeopardize these other obligations.

HANDBOOK OF PUBLIC ASSISTANCE ADMINISTRATION § 3435.3 (1947)[5]

III.

THE ESTABLISHMENT OF THE AFDC-FOSTER CARE PROGRAM.

In *King v. Smith*, 392 U.S. 309 (1968), this Court reviewed the origin of the Foster Care Program in HEW's and Congress' response to state AFDC "unsuit-

[5] Hereinafter cited as "HANDBOOK." The HANDBOOK, where applicable, is the official interpretative guide to Department of Health, Education and Welfare Policy. *Cf. King v. Smith*, 392 U.S. 309, 317 (1968). It incorporates, *inter alia*, previous "State Letters" and informational memoranda which HEW's predecessor agency, the Social Security Board, issued to state agencies. The bulk of the HANDBOOK has been superseded by the Code of Federal Regulations. Thus, §§ 3400-3499, including § 3435 of the HANDBOOK, were superseded by the regulations published at 36 Fed. Reg. 3868 (1971).

able home provisions." Under such provisions, a state would typically declare a home unsuitable and cut off all AFDC benefits, thus impoverishing the dependent children still further, while making no effort to improve conditions in the home or to locate a "suitable" alternative home. *King v. Smith*, 392 U.S. at 321-25.

In response to such provisions, HEW Secretary Flemming, on January 17, 1961 issued State Letter No. 452, later known as the Flemming Ruling. It provided that as of July 1, 1961:

> A State plan . . . may not impose an eligibility condition that would deny assistance with respect to a needy child on the basis that the home conditions in which the child lives are unsuitable, while the child continues to reside in the home. Assistance will therefore be continued during the time efforts are being made either to improve the home conditions or to make arrangements for the child elsewhere.

The Flemming Ruling furthered the AFDC program goals of maintaining and strengthening family life and meeting the needs of the dependent child. The ruling stated:

> *It is of great importance* that State agencies should be concerned about the effects on children of the environment in which they are living and *that services be provided which will be directed toward affording the children maximum protection and strengthening their family life.*

Id. (emphasis added). By requiring that assistance continue while efforts were made "either to improve the home conditions or to make arrangements for the child elsewhere," the Ruling recognized that there were unsuitable home situations in response to which remedial measures "should be taken."

After HEW prohibited "unsuitable home" provisions in the Flemming Ruling, Congress passed Section

404(b), Act of May 8, 1961, Pub. L. No. 87-31, § 4, 75 Stat. 77, 42 U.S.C. § 604(b) (1970). Section 404(b) approved HEW denials of federal funds to states enforcing provisions that denied aid to children living in unsuitable homes after September 1, 1962.[6] But that provision did nothing to respond to the needs of children living in truly unsuitable homes for whom a state should "make arrangements . . . elsewhere," as the Flemming Ruling suggested might be appropriate. To assure such children the most suitable alternative placement, Congress passed an Administration-proposed bill establishing on a temporary basis the AFDC-Foster Care Program. Act of May 8, 1961, Pub. L. No. 87-31 § 2, 75 Stat. 76, 42 U.S.C. § 608 (1970). *Public Welfare Amendments of 1962: Hearings on H. R. 10032 Before the House Ways and Means Committee*, 87th Cong., 2nd Sess. 294-97, 305-7 (Testimony of HEW Secretary Ribicoff and HEW Undersecretary Cohen); *Public Assistance Act of 1962: Hearings on H. R. 10606 Before the Committee on Finance*, 87th Cong., 2d Sess. 65 (1962) (Memorandum of Secretary Ribicoff to Sen. Byrd).[7] The Foster Care Program was a Congressional response to the Flemming Ruling and the problems it recognized. *See King v. Smith*, 392 U.S. 309, 323 (1968).

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[6] By extending the time for complying with the Flemming Ruling to September 1, 1962, Congress recognized that not all state legislatures would have a legislative session before July 1, 1961, and thus an opportunity to amend their state "suitable home" laws to conform to the Flemming Ruling. S. REP. No. 165, 87th Cong., 1st Sess. 6, (1961).

[7] "The first two of these provisions [AFDC-Unemployed Parent and AFDC-Foster Care] were proposed by the administration last year as a temporary measure to deal with emergency situations which had arisen in the country. The administration asked for the approval of this legislation on a temporary basis pending a complete study of the public welfare programs and a development of a comprehensive plan for their improvement." *Public Assistance Act of 1962: Hearings on H.R. 10606 Before the Committee on Finance*, 87th Cong., 2d Sess. 65 (1962).

IV.

THE OBJECTS AND POLICIES OF THE AFDC-FOSTER CARE PROGRAM.

Congress defined an eligible "dependent child" for purposes of the new Foster Care Program in Section 408(a) as a child who met the Section 406(a) definition of eligibility but who then:

(1) was removed from the home of his caretaker relative, after April 30, 1961, "as a result of a judicial determination to the effect that continuation therein would be contrary to [his] welfare," Section 408(a)(1), 42 U.S.C. § 608(a)(1) (1970);

(2) was placed in the care of the state agency administering the AFDC program,[8] Section 408(a)(2), 42 U.S.C. § 608(a)(2) (1970);

(3) was placed in a foster family home as a result of such a judicial determination,[9] Section 408(a)(3), 42 U.S.C. § 608(a)(3) (1970); and

(4) had been receiving AFDC in the home from which he was judicially removed in the month in which the court proceedings leading to this determination were initiated,[10] Section 408(a)(4), 42 U.S.C. § 608(a)(4) (1970).

These eligibility requirements were congruent with Congress' broadly stated purpose under the Program to "stimulate and assist the states in the protection and care of children." S. REP. No. 165, 87th Cong., 1st Sess. 7 (1961).

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[8] Amended in 1962 to authorize other state agencies to have responsibility for the placement and care of the child, under certain narrow conditions.

[9] Amended in 1962 to permit placement in a child care institution. *See* pp. 24-5, 39-40, *infra.*

[10] Amended in 1967 to include children eligible for AFDC in the month that judicial proceedings began, or six months prior thereto. *See* pp. 60-62, *infra.*

In the few years immediately preceding the enactment of the Foster Care Program, some states had adopted procedures under which AFDC mothers deemed to be maintaining unsuitable homes were coerced, under threat of formal neglect proceedings, to "voluntarily" place their children with relatives. W. BELL, AID TO DEPENDENT CHILDREN 124-36 (1965). To eliminate such practices under the Foster Care Program, and to protect children (and their parents) alleged to be living in unsuitable homes from unwarranted sanctions, Congress required that an eligible child could be removed from his home only by a "judicial determination" that his home was unsuitable. Section 408(a)(1).[11]

The focus of the program was thus on children who were judicially removed from their homes because of unsuitable conditions, and on "develop[ing] the most suitable care for children who have to be provided for outside their own homes." 107 CONG. REC. 6388 (1961) (Remarks of Sen. Byrd).

The few children[12] who had to be removed from their homes because of abuse or neglect shared a different and greater need than was met under the basic AFDC program. In the basic program, "need" is a loss of *economic* support because of the "death," "absence" or "incapacity" of the parents. Section 406(a). S. REP. No. 628, 74th Cong., 1st Sess. 17 (1935); H. R. REP. No. 615, 74th Cong., 1st Sess. 10 (1935). Although under Section

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[11] *See Social Security Amendments of 1967: Hearings on H.R. 12080 Before the Comm. on Finance, United States Senate,* 90th Cong., 1st Sess. 167 (1967) (Statement of Undersecretary Cohen); 108 CONG. REC. 12693 (1962) (Remarks of Sen. McCarthy).

[12] *See* 108 CONG. REC. 13562 (1962) (Remarks of Sen. McCarthy), citing a Children's Bureau estimate that only about 1% of AFDC children were victims of such neglect as to make them eligible for Foster Care.

408(a)(4), to be eligible for Foster Care, children must be, or recently have been, eligible for AFDC, the factor triggering Foster Care eligibility is not economic need. Rather, eligibility under Section 408(a)(1) is predicated on the special needs of children who have been so neglected or mistreated in their own homes, that a court has ordered them removed from those homes. The "home environments" of all such children had been "clearly contrary to [their] best interests." S. REP. No. 165, 87th Cong., 1st Sess. 6 (1961); *see also* 108 CONG. REC. 12563 (1962) (Remarks of Sen. Keating).

To assure that these neglected and abused children would be provided with the most suitable available placement outside their own homes, Congress required that the state welfare agency supervise the placement of an eligible child. Section 408(a)(2). More importantly, it defined the "foster family home" in which the state would be required to place an eligible child under Section 408(a)(3) as one licensed or meeting state licensing standards as a home suitable to provide Foster Care. Section 408, last paragraph. Under the Foster Care Program, therefore, the states were to define the qualitative criteria governing suitable placement for foster children. 107 CONG. REC. 6387 (1961) (Remarks of Sen. Kerr and Sen. Javits). This would assure that children who had been living in unsuitable homes would now live in "suitable" ones.

To meet its goal of helping assure the most suitable care for the class of children judicially removed from their homes, Congress required the "development of a plan for each such [foster] child . . . to assure that he receives proper care." Section 408(f)(1). These and other services, directed towards providing a permanent placement for the child as well as the most suitable foster

home, were central to the focus of the Program, and directly responsive to the abuse and neglect to which eligible children had been subject in their own homes. *See* HANDBOOK § 3452(13). These included services to the foster child in the foster family home, to help with, *e.g.*, the "emotional . . . problems" attendant upon judicial removal from his own home and services to the original parent to make possible the return of the foster child to his own home. *Id.*

Congress had always considered a parental or relative home to provide the only suitable care for dependent children. Sections 406(a), (b). But there was a need to provide more placements than relatives could provide for neglected children removed from their own homes, S. REP. No. 165, 87th Cong., 1st Sess. 6-7 (1961), and to address the problem that some relatives were unable to accept responsibility for such children because of other financial obligations and low AFDC benefit rates. HANDBOOK § 3435.3 (1947). Without enough relatives to accept the children, state and local governments had been required to bear much of the financial burden of caring for foster children in non-relative homes and in institutions, to the limited and insufficient extent that they were able to do so. S. REP. No. 165, 87th Cong., 1st Sess. 6-7 (1961). In sum, the "lack of financial resources for such care had hindered the development of the most suitable care for children who have to be cared for outside of their own home." *Id.*

To help states place homeless children where they would receive the "most suitable" care appropriate to their needs, it was necessary for Congress to authorize categorical Foster Care aid to all AFDC children abused and neglected in, and judicially removed from, their homes. Congress therefore expanded the number of homes in which the state might place such children, by

authorizing categorical matching funding even if the state placed such children in the homes of non-relatives. S. REP. No. 165, 87th Cong., 1st Sess. 6 (1961). By making the homes of "all individuals," *see* pp. 35-38, *infra*, eligible for federal aid, regardless of the relationship of the foster parents to such children, Congress maximized the number of homes in which such children might be placed, and still be eligible for federal welfare benefits. This advanced the goal of providing the most suitable care for such children. Thus, the purpose of making children placed in non-relative homes eligible for Foster Care was to leave the state courts "free to consider the situation as to the welfare of the child." 107 CONG. REC. 6387 (1961) (Remarks of Sen. Kerr).

In 1962, Congress made the Foster Care Program permanent, and expanded eligibility to cover children placed in child care institutions. HEW Secretary Ribicoff recommended the institutional amendment, stating that the purpose of the amendment was to "allow the States a wider latitude in finding the most suitable place for an individual child." *Public Assistance Act of 1962: Hearings on H.R. 10606 Before the Committee on Finance*, 87th Cong., 2d Sess. 65 (1962) (Memorandum of Secretary Ribicoff to Senator Byrd).

The House passed the child care institution amendment, but the Senate Finance Committee rejected it. Senator McCarthy introduced the amendment on the Senate floor, stating that its purpose was to permit the most appropriate placements for neglected children, who often had special problems, because of the unsuitable homes in which they had been living.

> The conditions which make it necessary to remove such children from unsuitable homes often result in needs for special psychiatric and medical care of the children. . . .
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> * * *

> A second factor which limits the courts under the present law is that of the difficulty—and apparently in many cases the impossibility—of finding foster family homes for children under these circumstances. These are the most underprivileged children and often have special problems. . . .
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> * * *
>
> The issue is whether the Federal Government is going to place restrictions on programs which limit the courts from making a placement in the best interest of the child, forcing him to remain in a home which has been determined as an unsuitable place.

108 CONG. REC. 12692-93 (1962).

In establishing the Foster Care Program, Congress made it possible to make higher Foster Care payments to eligible children than would be paid under the basic program. Foster Care payments were to be determined "according to State standards as to the appropriate amount needed for *such care*," not necessarily the same as needed by children under the regular program. S. REP. NO. 165, 87th Cong., 1st Sess. 6 (1961) (emphasis added.) Indeed, all participating states, including Illinois, immediately began paying substantially higher benefits under the Foster Care program than under the basic program, even though Congress did not provide any higher federal matching share for Foster Care benefits.[13] These states, as well as Congress, thus recognized that the Foster Care program was intended to benefit a class of neglected children with greater needs than children eligible for the basic program;

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[13] In October, 1961, the first month for which HEW reported Foster Care payment levels under a separate table listing, the seven participating states paid an average of $76.28 monthly in benefits for each foster child. The same states paid an average of $35.45 for each child receiving regular AFDC benefits. 25 SOCIAL SECURITY BULLETIN, No. 2, Tables 10, 14 (Feb. 1962). This differential has prevailed. U.S. DEPT. OF HEW, PUBLIC ASSISTANCE STATISTICS: APRIL 1977 (Sept. 1977), *Compare* Tables 4 and 7.

providing "the appropriate amount needed for . . . care" of these children, *Id.*, involved correspondingly greater expenses.

In 1967 Congress greatly assisted the states in providing the most suitable care for this class of neglected children, and assuring benefits reflecting their special needs, by increasing the federal match for Foster Care benefits (under Section 403) to more than two and a half times that available for benefits under the basic program. Social Security Amendments of 1967, Pub. L. No. 90-248, § 205(b), 81 Stat. 892 (1968), 42 U.S.C. § 603(a)(1)(B) (1970).[14] The Senate Report stated that the increase was necessary "in order to obtain the best possible environment for the child." S. REP. No. 744, 90th Cong., 1st Sess. 163 (1967). The House and Senate Reports both stated that the increase was based on the recognition that "foster family care is more costly than care in the child's home," and was necessary to "facilitate plans being developed for children based on the need of the child." *Id.*, at 164-5. H. R. REP. No. 544, 90th Cong., 1st Sess. 101 (1967).

In short, Congress' overriding purpose in establishing, making permanent and providing increased federal funding for the Foster Care Program was to help assure that neglected and abused children removed from their own homes by state action would receive that suitable care most appropriate to their special needs. It was a program of "remedial action." S. REP. No. 165, 87th Cong., 1st Sess. 6 (1961). For the class of neglected AFDC children judicially removed from unsuitable

[14] In 1965 Congress had given the states an alternative to claiming federal AFDC funding under § 403 by permitting them to receive funding under § 1118. Social Security Amendments of 1965, Pub. L. No. 89-97, § 411, 79 Stat. 423 (amended 1968, 1976). Many states still used the § 403 funding formula in 1967; several still do.

homes and placed in the care of the appropriate state welfare agency, Congress required proper placement efforts, supervised by the state agency. It required the "foster family home" or "institution" in which eligible children were placed to meet state-defined standards governing its suitability as a foster child placement. It authorized categorical federal aid for these children, in all such homes and institutions, thus freeing the states from major financial restrictions inhibiting them from making the most suitable placements for the children. Finally, because of the special needs of all children removed from their homes by judicial action, the Program provided substantial additional cash money benefits and specialized services not provided under the basic program.

As the next section demonstrates, Illinois' placement policy parallels that of Congress. Thus, where the homes of relatives meet state qualitative standards, Illinois places foster children in such homes; it simply refuses to provide to these children the special benefits and services which Congress determined that they needed.

V.

ILLINOIS PLACES OTHERWISE ELIGIBLE FOSTER CHILDREN IN THE HOMES OF RELATIVES AND APPROVES THESE HOMES AS MEETING ITS OWN QUALITATIVE LICENSING STANDARDS FOR THEIR CARE; THESE CHILDREN THEREBY COME WITHIN THE FEDERAL DEFINITION OF AFDC-FOSTER CARE ELIGIBILITY, UNLESS CONGRESS MEANT TO EXCLUDE SUCH HOMES FROM THE STATUTORY UNDERSTANDING OF "FOSTER FAMILY HOMES."

In this case, the state officials implicitly concede, as they must, that Timothy and Mary Lou Robertson meet the Foster Care eligibility requirements specified in Sections 408(a)(1), (2), and (4): they were eligible for

AFDC, judicially removed from their own home because of a finding of neglect, and placed in the care of DCFS. Because DCFS later placed Timothy and Mary Lou in the home of a relative, however, appellants deem them ineligible for AFDC-Foster Care. Illinois contends that the homes of relatives in which it places foster children are not "foster family homes" within the meaning of Section 408(a)(3). The benefits Congress meant to provide to neglected children judicially removed from their own homes and placed in "foster family homes" are thereby denied to these children.

Section 408 sets forth a statutory definition of "foster family home":

> For purposes of this section the term "foster family home" means a foster family home for children which is licensed by the State in which it is situated or has been approved, by the agency of such State responsible for licensing homes of this type, as meeting the standards established for such licensing. . . .

If the (relative) homes in which the state places the children here come within this statutory definition, then the children are eligible for AFDC-Foster Care, since these homes' alleged failure to meet the Congressional definition of a "foster family home" is the only reason why the state denies eligibility to the children.

Illinois deems placement of its state wards in the homes of relatives to be at least as suitable, if not a more suitable, placement, than one with non-relatives;[15] indeed, it has placed about 1900 state wards for which it has responsibility in relative homes. *See* n. 23, *infra.*[16]

[15] ILL. REV. STAT. ch. 23, § 705-7 (Supp. 1977) provides, in relevant part, that a juvenile court may place a state ward in "the custody of *a suitable relative* or other person" (emphasis added).

[16] DCFS, PLACEMENT MANUAL, Ch. 3, Pt. V (IV) (1972), (A. 37), provided that "relative resources should be explored for all children for whom placement is indicated." This provision has been redesignated as DCFS, CHILD WELFARE MANUAL 2.8.2 (1976).

Moreover, Illinois has at all relevant times required the homes of relatives in which foster children are placed to meet the state standards for licensing related to the quality of care received by the child in the home.[17] Accordingly, DCFS not only placed Timothy and Mary Lou in the home of a relative, but approved it, as it does all

[17] ILL. REV. STAT. ch. 23, § 4-1.2 (Supp. 1977), states that children in state custody are eligible for regular AFDC benefits if placed in a "foster family home . . . licensed pursuant to the Child Care Act . . . *or approved by the Department as meeting standards established for licensing under the Act*" (emphasis added).

ILL. REV. STAT. ch. 23, § 2217 (Supp. 1977), provides that:

> The Department must prescribe and publish minimum standards for licensing that apply to the various types of facilities for child care defined in this Act *and that are equally applicable to like institutions under the control of the Department* . . . (emphasis added).

ILL. REV. STAT. ch. 23, § 2212.05 (Supp. 1977), defines "facility for child care" to include "homes" as well as "institutions."

DCFS, PLACEMENT MANUAL, Ch. 3, Pt. V (IV) (1972), (A. 38), as amended and redesignated DCFS, CHILD WELFARE MANUAL 2.8.2 (1976), implemented ILL. REV. STAT. ch. 23, § 2217:

> When a relative home is being considered as a placement resource, the home must meet the minimum standards for foster family homes, although the home is not subject to licensing.

DCFS Regulation 5.12, at all relevant times, has specified the "Minimum Standards for Licensed Foster Family Homes." Subsequent to the district court's Final Judgment herein, DCFS Regulation 5.12 was amended to state, "Regardless of auspices, all foster family homes shall meet licensing requirements and standards." *See* First Amended Interim Report to the [District] Court, filed October 9, 1976); a "relative home" was redefined as a type of "foster home" which must be approved by the Department for care of a state ward. DCFS, CHILD WELFARE MANUAL 2.2.1, 2.2.2 (1977). DCFS, CHILD WELFARE MANUAL 2.8.2 now reads, in relevant part, "Children for whom the Department has legal responsibility . . . *shall be placed only* with relative caretakers *approved* by the Department" (emphasis in original). Thus, at all relevant times state law and policy have required relative foster homes to meet state licensing standards applicable to the homes in which state wards are placed.

relative foster homes in which it places state wards, as meeting Illinois' defined qualitative "standards for . . . licensing." Section 408. DCFS signifies its approval of such homes as suitable foster placements in a Home Placement Agreement materially identical to that used to license non-relative foster homes in which it places identically situated children.

The licensing or approval requirement was, as explained, included to assure that the homes in which the state placed eligible foster children would meet minimum state qualitative licensing standards for their care. Under Illinois' own policy, the state regularly places the otherwise eligible children here in the homes of relatives, and approves their homes as meeting such standards. Therefore, insofar as the statutory definition of "foster family home"—and the plaintiff children's eligibility for the Foster Care Program—turns on whether the home in which otherwise eligible children are placed have been "approved . . . as meeting the standards established for . . . licensing," the relative homes in which the children here are placed meet that definition. This means that Illinois has itself brought these homes within the statutory definition of "foster family homes," and the children here placed in such homes within the federal definition of eligibility, unless Congress meant simply to exclude the home of a relative of an otherwise eligible child from the statutory understanding of the term "foster family home."

Whether Illinois could adopt an explicit state policy that relative care was unsuitable for foster children, and so refuse to license or approve such homes as "foster family homes" and place children in them, thus is not a question presented in this case.[18] Illinois does deem relative homes suitable placements for foster children,

[18] The Solicitor General correctly questions whether, if Illinois did adopt such a policy, it would pass muster under the Act. (Brief for the United States as Amicus Curiae at 17).

(Footnote continued on following page)

approves such homes as meeting the standards established for licensing within the meaning of Section 408 and places foster children in them. Appellants do not argue otherwise.[19] The question in this case is thus whether Illinois can approve the homes of relatives as placements for otherwise eligible foster children, and then deny Foster Care eligibility, benefits and services to those children.

[18] *continued*

Though Congress certainly intended the states to define the qualitative standards governing suitable placements for foster children, it does seem questionable whether Illinois could apply their licensing standards in a way to completely undermine the express purpose of the Act to "encourage the care of dependent children in their own homes or in the homes of relatives," § 401, much less place foster children in the homes of relatives but not approve them, and then deny eligibility on this ground. Common sense rebuts the suggestion that Congress meant to permit a state to deny eligibility for any and all benefits under the AFDC-Foster Care Program to a child because of the state's failure to extend to him a safeguard Congress intended for his protection, placement in a licensed or approved home. HEW has issued a Memorandum to the states stating specifically that the states can not, by refusing to license or approve a home in which it had placed an otherwise eligible child, deny Foster Care eligibility to that child. HEW Memorandum APA-IM-71-7 (1971), at Appellees' Supp., S-4. The same rule is incorporated in 45 C.F.R. § 233.110 (1976), which provides that for children such as those here, meeting the eligibility requirements of §§ 408(a)(1), (2), and (4), the state must develop a plan so that [they] *will* be placed in a foster family home in accordance with . . . [their] need[s]." 45 C.F.R. § 233.110(a)(2)(i) (emphasis added). In other words, a state has no discretion not to place the children here in a "foster family home." Therefore, under HEW regulations, any homes in which the children here are to be (or have been) placed must be approved (or must, under the regulations, have been approved) as meeting state licensing standards.

[19] Appellants have abandoned any argument that they can deny AFDC-Foster Care eligibility to the children here because the (relative) foster homes in which the state places them cannot be or have not been licensed or approved as meeting the standards established for licensing within the meaning of § 408, last paragraph, and thus cannot be "foster family homes" within the meaning of § 408(a)(3). This argument was presented in the Court of Appeals and rejected, *Youakim*, 562 F.2d at 488; appellants do not advance it here.

VI.

ILLINOIS CANNOT DENY AFDC-FOSTER CARE ELIGIBILITY TO OTHERWISE ELIGIBLE FOSTER CHILDREN SOLELY BECAUSE IT PLACES THEM IN THE HOMES OF RELATIVES.

The state officials argue here that denying Section 408 benefits and services to otherwise eligible foster children Illinois places in relatives' homes is permissible under the Act, as well as required by the challenged statutes, because the term "foster family home" in Section 408(a)(3) must be understood to exclude the home of an otherwise eligible child's relative. This argument, which is premised on a Congressional intent to exclude children placed in relatives' homes from Foster Care eligibility, is incorrect.[20] As shown below, the language of Section 408, related provisions of the Act, and the legislative history of the Foster Care Program, demonstrate that Congress meant to require Foster Care coverage for an otherwise eligible child the state placed in *any* home meeting state qualitative standards, including the home of an otherwise eligible child's relative.

A. A threshold question is whether the ordinary use of the word "foster" is confined to non-relatives, since Congress is assumed to use words in their ordinary way. *Shea v. Vialpando*, 416 U.S. 251, 260 (1974); *Richards v. United States*, 369 U.S. 1, 9 (1962).[21] Both in common

[20] Inferentially, the state argues, the same exclusionary treatment of otherwise eligible children placed in relative homes would be required in all fifty states, including the at least 36 states which presently do cover such children under their Foster Care Programs. See Memorandum for the United States as Amicus Curiae submitted in *Youakim I*, at A. 5.

[21] In the Court of Appeals, the state officials contended that the ordinary meaning of the word "foster" denoted a non-relative home. *Youakim*, 562 F.2d at 486. In this Court, however, they maintain only that "the definition of 'foster family home' is unclear from the statute itself." State Brief at 22.

speech and in judicial decisions the adjective "foster," (*e.g.*, "foster child," "foster parent," "foster family home," etc.) is often used to denote care by non-parental relatives. In *Baumet v. United States*, 344 U.S. 82 (1952), an insured serviceman's natural father had abandoned him. Thereafter, until his death, the serviceman's aunt and uncle cared for him. This Court referred to the parents as "foster parents." 344 U.S. at 84-5.[22] And in *Smith v. Organization of Foster Families*, 431 U.S. 816 (1977), this Court stated:

> A biological relationship is not present in the case of the *usual* foster family.

431 U.S. at 843 (emphasis added).[23]

This usage of the term is also employed by Illinois courts. *Dixon National Bank of Dixon v. Neal*, 5 Ill.2d 328, 333, 125 N.E.2d 463, 466 (1955) (aunt as "foster-mother"). While standard dictionary definitions diverge on whether "foster" includes non-parental relative,[24]

[22] *See also* Douglas, J., dissenting in part, 344 U.S. at 85, and *Baumet v. U.S.*, 191 F.2d 194, 196-7 (2d Cir. 1951). (Swann, Learned Hand, Augustus Hand)

[23] This is, statistically, true in Illinois as well. Over 18,000 state wards were in foster family homes in 1976, at the time of the district court decision. ILLINOIS DEPARTMENT OF CHILDREN AND FAMILY SERVICES, *1978-80*, PLAN FOR CHILDREN AND FAMILY SERVICES (1977). Fewer than 1900 of these wards were placed in the homes of relatives. Affidavit of Michael D. Timko (Chief, Division of Information Systems, DCFS) filed in proceedings below with U.S. Court of Appeals (7th Cir.) on September 9, 1976. This Court, in *Smith*, also stated:

> The term "foster care" is often used . . . to apply *to any type of care that substitutes others for the natural parent in the parental role. including* group homes, adoptive homes, and institutions, as well as *foster family homes.* [Citing A. KADUSHIN, CHILD WELFARE SERVICES, 355 (1967)] (emphasis added.)

[24] Compare IV THE OXFORD ENGLISH DICTIONARY 486-87 (1970) and RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE, 559 (1967) (including relatives) with FUNK AND

(Footnote continued on following page)

legal decisions regularly include the expansive understanding of the term.[25]

As *Baumet* and *Smith* indicate, the "foster" concept turns not on the presence or absence of kinship, but rather depends on the qualitative relationship between the child and the new, substitute parents, as derived from the "law and contractual arrangements." *Smith v. Organization of Foster Families*, 431 U.S. at 845. In the present case, Section 408(a) defines that relationship primarily in terms of the circumstances and events in the foster child's life: judicial removal from his home, care and custody by a state agency, and placement in a foster home. And it defines "foster family home" in terms of state's law governing the suitability of that home to nurture that relationship. Illinois law, in turn, requires a relative foster home to meet state

[24] *continued*
WAGNALL'S STANDARD COMPREHENSIVE INT. DICTIONARY 498 (1973) (excluding relatives). See also WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 897 (1976), discussed in *Youakim*, 562 F.2d at 486. As in *Burns v. Alcala*, 420 U.S. 575 (1975), "reliance on dictionaries cannot solve the question presented in this case." 420 U.S. at 578 n.3.

[25] *E.g., Norfolk and W. Ry. Co. v. Estepp*, 204 F.2d 880, 881 (6th Cir. 1953) (Grandfather's wife as "foster mother"); *Thomas v. U.S.*, 189 F.2d 494, 497 (6th Cir. 1951) (Aunt as "foster parent"); *Pistone v. Romano*, 349 F.Supp. 293, 294 (E.D. Pa. 1972) (Aunt and uncle as "foster parents"); *Davis v. Celebrezze*, 239 F.Supp. 608, 612 (S.D. W.Va. 1965) (Grandparents as "foster parents"); *Miller v. Ribicoff*, 209 F.Supp. 460, 462 (E.D. Pa. 1962) (Aunt and uncle as "foster parents"); *In Re James M*, 65 Cal. App. 3d 254, 257, 135 Cal. Rptr. 222, 224 (1976) (Nephew as "foster child"); *Perrenoud v. Perrenoud*, 206 Kan. 559, 566, 480 P.2d 749, 752 (1971) (Aunt and uncle as "foster parents"); *Boling v. Barnes*, 216 So. 2d 804, 804 (1968) (Aunt as "foster parent"); *In Re Erny Trust*, 415 Pa. 8, 10, 202 A.2d 30 (Niece as "foster daughter"); *Commonwealth v. Shade*, 242 Pa. Super. 115, 118, 363 A.2d 1187, 1188 (1976) (Aunt and uncle as "foster parents"); *Popko v. Janik*, 341 Mass. 212, 215, 167 N.E.2d 853, 854 (1960) (Wife's relative as "foster son"); *Pickle v. Page*, 252 N.Y. 474, 475, 169 N.E. 650, 651 (1930) (Grandparents as "foster parents"). See also cases cited at n. 42, *infra*.

licensing standards governing its suitability; the state's approval of such homes as meeting these standards is incorporated in a contract, the Home Placement Agreement.

The existence of substantial case law bringing relative care within the denotation of "foster" is not by itself dispositive of the question here. But Congress' central concern with helping assure the most suitable placement for neglected children removed from their homes, in the context of a remedial program designed to meet the children's special needs, is convincing evidence that a restrictive definition of "foster family homes," when there is no restrictive meaning to that word given in the Act itself, would only subvert Congress' intent. In sum, "foster" commonly, if not invariably, denotes relative as well as non-relative care of children. To give the term "foster family home" the denotation of "relative home" (as well as "non-relative home") ascribes to it a meaning it commonly and easily bears and is consistent with the purposes of the program.[26]

B. "[T]he term 'aid to families with dependent children' [used in 402(a)(10)] is given a very specific meaning in Section 406(b)." *Quern v. Mandley*, 46 U.S.L.W. 4594, 4598 (June 6, 1978). The same term with relation to foster children judicially removed from the home and needing foster care is given specific meaning in Section 408(b):

> (b) the term "aid to families with dependent children" *shall* . . . include . . . foster care in behalf of a child described in paragraph (a) of this section

[26] Similarly, Illinois uses "foster" in the broader sense, see *Dixon National Bank at Dixon v. Neal*, 5 Ill.2d 328, 333, 125 N.E.2d 463, 466 (1966); and, except when it comes to providing the benefits and services at issue in this case, Illinois does not distinguish between relative and non-relative placements. *See* pp. 28-30, *supra*.

(1) in the foster family home *of any individual* . . . (emphasis added).

The emphasized language is plainly important here and demonstrates the absence of any Congressional intent to exclude *a priori* a class of individuals as potential foster parents (or any class of homes meeting state qualitative standards as potential "foster family homes"). In *Shea v. Vialpando*, 416 U.S. 251, 260 (1974), another AFDC case, this Court said:

> By its terms, Section 402(a)(7) requires the consideration of "any" reasonable work expenses in determining eligibility for AFDC assistance. In light of the evolution of the statute and the normal meaning of the term "any," we read this language as a congressional directive that no limitation, apart from that of reasonableness, may be placed upon the recognition of expenses attributable to the earning of income.

To support their position, the state officials must read "any individual" in Section 408(b) as "any individual (except one related to the foster child)." This does not square with the "normal meaning" of the word "any." *Id.*

The state officials never come to terms with the import of the phrase "of any individual" in Section 408(b). They argue:

> [T]he term "any individual" in § 406(b) [*sic*] manifests the intention of Congress that assistance is to be provided for foster care whether the care is administered in the home of an individual person or family, or in a child-care institution. No other interpretation is logically possible.

State Brief at 21.

This explanation of Congress' intent is remarkable because it does not, by its terms, exclude relatives from the meaning of the term "any individual." Appellants' phrasing of "the intention of Congress" reflects the insurmountable semantic problem of excluding a related

individual from the scope of the phrase "any individual." The attempt to imply that the phrase was intended to contrast with care in a child-care institution founders on the legislative history: coverage for children placed in the foster family home of "any individual" was required one year before institutions were included as placements for eligible children.

In the absence of some reason to depart from the normal meaning of the phrase, the term "any" must here, as in *Shea v. Vialpando*, 416 U.S. 251, 260 (1974), mean a "congressional directive that [there is] no limitation" on the categories of persons, necessarily including relatives, who may provide "foster family homes" within the meaning of the statute.[27]

This construction of the phrase "any individual" is also most consistent with the purpose of the Foster Care Program to meet the needs of the eligible foster child by helping assure that he would receive the most suitable care available outside of his own home. The entire AFDC program is grounded on Congress' stated preference for relative care of dependent children and aversion to institutional care. S. REP. No. 628, 74th Cong., 1st Sess. 16-17 (1935); H.R. REP. No. 615, 74th Cong., 1st Sess. 10 (1935). Section 401 states that the purpose of the AFDC program is "to encourage the care of dependent children in their own homes or in the homes of relatives." Faced with this explicit preference for relative care under the AFDC programs, combined with an articulated purpose to provide the most suitable placements for foster children, appellants cannot

[27] Such a directive does not, of course, suggest that a state *must* place a child in the home "of any individual" or "any relative" who wishes to become a foster parent. As discussed at pp. 22, 30-31, *supra*, the state should properly place children only in foster family homes meeting its standards. Relative foster homes in Illinois are required to meet such standards. *See* pp. 29-30, *supra*.

plausibly maintain that Congress excluded from the Foster Care Program children placed in precisely the type of homes Congress generally considered to provide the most suitable care for children. There is no basis for finding that Congress suddenly departed from the fundamental principles of the Act and *sub silentio* gave preference to non-relatives (and, later, institutions) over relatives.

C. Congress did not require in Section 408 that a state actually license every foster family home. Congress established an equivalent "approval" procedure, providing that, as an alternative to licensing, a foster home could be "approved . . . as meeting the standards for . . . licensing." The legislative history of Pub. L. No. 87-31 does not explicitly indicate why Congress wrote the alternative approval procedure into the law for children judicially removed from their homes because of delinquency or neglect. But in 1961 some state laws exempted relative homes from licensing.[28] No other class of homes in which foster children might be placed were similarly excluded from licensing. Given this fact, the "approval" procedure would appear most logically to be Congress' means of assuring that the "licensing" safeguard would be extended to foster children placed in the homes of relatives.

A primary purpose of the Foster Care Program was to assure that foster homes met such qualitative standards:

[28] COLO. REV. STAT. §§ 26-6-104(2) (1973); FLA. STAT. ANN. §§ 409, 175(2) (1943) (West); IDAHO CODE §§ 39-1209, 39-1213, 39-1214 (1932); ILL. REV. STAT. Ch. 23 §§ 2212.05, 2212.17, 2214 (Supp. 1977); IOWA CODE ANN. §§ 237.2, 237.3 (1969) (West); MD. ANN. CODE art. 88A §§ 20, 21 (1957); MO. ANN. STAT. §§ 210.211 (1976); MONT. REV. CODES ANN. §§ 10-520, 10-521 (1977); N.H. REV. STAT. ANN. § 170.3 (1977); PA. STAT. ANN. tit. II, §§ 801, 802 (1961) (Purdon); R.I. GEN. LAWS §§ 40-13-2, 40-18-3 (1956); TEX. STAT. ANN. art. 695(c) § 8(a) (1964); VT. STAT. ANN. tit. 33 §§ 501, 502 (1959); WASH. REV. CODE ANN. §§ 74.14.120, 74.14.130 (1961); WIS. STAT. ANN. § 48.62 (1957) (West).

placement of abused and neglected children in suitable homes was crucial to their welfare. Congress must surely have anticipated that, in many cases, the state would place its wards in the homes of relatives. *See* p. 28, *supra* and n.32, *infra*. Anticipating such placements, and with presumptive "full knowledge" of state licensing laws, *Prudential Insurance Co. v. Benjamin*, 328 U.S. 408, 430 (1946), Congress had to provide that (relative) foster homes would be approved as meeting the standards for licensing even if not required to be "licensed" *per se* under state law. By providing for the "approval" of "foster family homes," Congress thereby indicated that it meant otherwise eligible children placed in the homes of relatives to be covered under Section 408. For there would be no reason for Congress to have required that such relative homes be approved as meeting state licensing standards unless the children placed in those homes were meant to be eligible for AFDC-Foster Care.

In short, consistent with the goals of achieving suitable placements and maximizing the number of possible placements, Congress provided for coverage of placement of a Section 408 child in the home of any individual—so long as it was licensed or approved under state qualitative standards. As discussed in the next sections, subsequent amendments to the Foster Care Program underscored both the general purposes of the Program and the propriety of placement in the homes of relatives as consistent with those purposes.

D. Congress made the Foster Care Program permanent in 1962. Congress also amended Section 408 in 1962 to provide Foster Care coverage for children placed in child care institutions. Public Welfare Amendments of 1962, Pub. L. No. 87-543, § 135(a) 76 Stat. 172. It did so to assure that children for whom this might be the most suitable available placement would be covered under the Foster Care Program. 108 CONG. REC. 12693 (1962) (Remarks of Sen. McCarthy); *See* pp. 24-5, *supra*. Such a

Congressional purpose to provide Foster Care benefits in the most suitable homes would surely have led Congress to extend the program to homes of relatives also, were not such homes already covered, unless Congress deemed them less suitable than institutions for the care of foster children. The state officials' restrictive interpretation of "foster family home" must rest on the latter hypothesis. But the genesis of the entire AFDC program lay in Congressional hostility to institutionalization of dependent children. S. REP. No. 628, 74th Cong., 1st Sess. 16-17 (1935); H.R. REP. No. 615, 74th Cong., 1st Sess. 10 (1935). Under the 1956 Amendments to the Social Security Act, the stated purpose of the program was to "encourag[e] the care of dependent children in their own homes or in the homes of relatives." Section 401. Respect for this expressed Congressional preference, and Congressional hostility to institutionalization, supports the conclusion that any Congressional expansion of the placements covered under the Foster Care Program in order to assure the most suitable homes for neglected children, would not have included institutional placements if relative placements (*i.e.*, placements in the home "of any individual") had not already been available under the program, under the 1961 legislation.

E. The Public Welfare Amendments of 1962, also added to Title V of the Act a new Section 528 (repealed 1967; current version at 42 U.S.C. § 625 (1970)) defining "child welfare services." Pub.L. No. 87-543, § 102(d)(1), 76 Stat. 184.

> For the purposes of this part, the term "child-welfare services" means public social services which supplement or substitute for parental care and supervision for the purpose of . . . protecting and promoting the welfare of children *including the strengthening of their own homes where possible, or where needed, the provision of adequate care of children away from their homes in foster family homes* or day-care or other child-care facilities (emphasis added).

The reference to "foster family homes" in this provision is Congress' only use of that term in the Act other than in Section 408 itself. The identity of language between these two statutes, passed contemporaneously, indicates that they should be interpreted the same way. *Northcross v. Board of Education*, 412 U.S. 427, 428 (1973). While the state officials assert that "foster family home" in Section 408 includes all such homes except those of relatives, the exclusion of relative homes is based neither on their "adequacy" as placement resources (the state, after all, places children in such homes, and approves them as meeting licensing standards) nor on the need of children for care in such homes—all children placed in such homes have been neglected and abused in, and then judicially removed from, their own homes. The inclusion of relatives' homes within "foster family home" in Section 408, on the other hand, is consistent with Congress' apparent understanding of the term in Section 528 as providing "*needed . . . adequate*" care of children "away from" their "own homes." This supports the conclusion that relatives are included. *Northcross*. The distinction drawn by Section 528 is between "foster family homes" and the children's "own homes." There is no hint that the distinction between "relative homes" and "non-relative homes" defines "foster family homes."

F. As of 1967, only 24 states and about 9,000 children participated in the Foster Care Program.[29] Congress' intent under the program had been to assist the states in assuring the best possible care for neglected AFDC children; it had instituted a program of

[29] 5 WELFARE IN REVIEW No. 5, Table 9 (May, 1967).

"remedial action" towards this end. S. REP. No. 165, 87th Cong., 1st Sess. 6 (1961). But the great majority of children who might be helped by the program remained ineligible for it because of state non-participation.

In the Social Security Amendments of 1967, Pub. L. No. 90-248, 81 Stat. 892 (1968), Congress acted to fill this significant gap in coverage by making the Foster Care Program mandatory for all states participating in the regular AFDC program. Pub. L. No. 90-248, § 205(a), 81 Stat. 892 (1968) (codified at 42 U.S.C. § 602(a)(20)). As discussed, Congress also increased the federal match for Foster Care benefits so that it greatly exceeded the federal share for benefits paid under the basic program. *See* Section 403(a)(1)(B). The articulated basis of this decision was a Congressional finding that foster care was more expensive than care in the child's "own home," that states could not finance this greater cost without additional federal help, and that there was a need to assist the states in providing Foster Care benefits "based on the need of the child." H. R. REP. No. 544, 90th Cong., 1st Sess. 100-101 (1967); S. REP. No. 744, 90th Cong., 1st Sess. 165 (1967). The Solicitor General correctly observes, Brief for the United States as Amicus Curiae at 12-13, that Congress' basis for raising federal matching rates for Foster Care in 1967 "reinforces the conclusion" that it meant otherwise eligible children placed in the homes of relatives to be covered under the Foster Care Program. Just as the unique "need of the child" neglected or abused in, and judicially removed from, his own home, is the same regardless of whether he is later placed in a relative or non-relative home, also identical in either kind of foster home is the increased cost of meeting that need for these "most underprivileged children . . . [who] often have special problems." 108 CONG. REC. 12693 (1962) (Remarks of

Sen. McCarthy). Moreover, the Placement Agreement utilized in Illinois imposes identical obligations upon relative homes caring for foster children, as are imposed upon non-relative foster homes; the expenses necessary to meet these obligations are, by definition, the same. By definition, both groups of children also need the special services mandated by Section 408.[30]

By contrast, the import of the state's position is that Congress intended to bifurcate the class of those "most underprivileged" children on the basis of a status, residence in a relative home, which had no relationship to the special need which Congress designed these additional benefits to meet. Abused and neglected children placed by the states in non-relative homes would receive the additional benefits Congress wished the states to provide; the same children, if placed in relative homes, would not.

From a different perspective, the 1967 federal funding increase for Foster Care strongly supports the conclusion that Congress meant a "foster family home" to include a "relative home." If the state's position were correct, the 1967 funding increase amendment would have represented a specific Congressional effort to encourage

[30] DCFS in fact recognizes that otherwise eligible children it places in relative homes have special needs for additional benefits, just as do children it places in non-relative homes, for it gives special grants up to $105 to some children placed with relatives. State Brief at 5. This special DCFS program is obviously not regular AFDC; it is unavailable to any children receiving benefits under § 406. Rather, it constitutes a partial, albeit legally inadequate, recognition that foster children placed with relatives, unlike children in the regular AFDC program, are identically situated to other foster children with respect to need. DCFS thus recognizes the unique needs of such children, and approves the relative homes in which it places them as suitable homes, but simply refuses to extend, as a matter of right, the eligibility, benefits, and services mandated for *all* such children by § 408.

care of foster children in non-relative homes and in institutions rather than in relative homes. The higher cash benefits Congress intended to provide under that amendment would have been available under appellants' reading of Section 408(a)(3), only to non-relative homes and institutions. Congress would then have created a greater financial incentive for non-relative homes and institutions to care for neglected and abused children than it would have for relative homes to care for the same children. The result could only be fewer placements in homes of relatives[31] and more with strangers or in institutions. Moreover, since only placement in non-relative homes would make the child eligible for the federally-funded higher cash benefits and more intensive services available under the Foster Care Program, participating states would have an incentive to place children in non-relative homes, in order to provide them such benefits and services.

The Foster Care Program was meant to develop the most suitable care for neglected dependent children removed from their homes. The AFDC program had been established on the premise that the most suitable care for a dependent child was with family members, and that institutionalization of children was to be discouraged.[32] Section 401, applicable to the Foster Care

[31] The available research supports the common sense presumption that there is a direct relationship between foster care payment levels and the supply of foster homes. See *e.g.*, SIMON, *"The Effect of Foster-Care Payment Levels on the Number of Foster Children Given Homes,"* 1975 SOCIAL SERVICE REVIEW 405, finding that a given percentage increase in foster care payment levels would result in a percentage increase in the supply of foster homes between half and fully as large.

[32] More recent social welfare legislation embodies continuing Congressional aversion to institutionalization of children. See *e.g.*, Social Services Amendments of 1974, Pub. L. No. 93-

(Footnote continued on following page)

Program, specifically incorporated that Congressional preference. The state's position therefore attributes to Congress an intent to abandon, *sub silentio*, both 25 years of consistent policy under the AFDC program, and common sense, by encouraging the greatly increased financial expense and deleterious effects of institutionalizing children.

The state officials never address, except elliptically, the irony of a construction of Section 408 which at-

[32] *continued*
647 § 2, 88 Stat. 2337 (1975), 42 U.S.C. § 1397 (1970) (stating the goals of the Title XX Social Service Program as including the "preven[tion] of inappropriate institutional care"); Juvenile Justice and Delinquency Prevention Act of 1974, Pub. L. No. 93-415, § 102, 88 Stat. 1110, 42 U.S.C. § 5602 (stating one of the goals of juvenile delinquency and prevention programs to "provide critically needed alternatives to institutionalization").

Congressional hostility to institutionalization corresponds to a wealth of empirical data establishing that the emotional and psychological needs of children are better met in family (including foster family) care than in institutional settings, and that children in institutional settings are particularly likely to be exposed to neglect and abuse. Two relevant studies are: S. PROVENCE and R. LIPTON, INFANTS IN INSTITUTIONS (1962), M.D. AINSWORTH, et al., DEPRIVATION OF MATERNAL CARE: A REASSESSMENT OF ITS EFFECTS (1962).

Such evidence explains the virtual unanimity of opinion among child care specialists favoring family care over institutional care. D. GILL, *Institutions for Children*, in CHILDREN AND DECENT PEOPLE (1974), pp. 53-87 and H. JAMES, CHILDREN IN TROUBLE: A NATIONAL SCANDAL (1970) are two studies reviewing the voluminous literature. See also A. KADUSHIN, CHILD WELFARE SERVICES (2d ed., 1974).

The dominant cultural values which lead to a societal preference for family over institutional care for children, are also manifested in legal solicitude for care of children by relatives. *See Moore v. City of East Cleveland*, 431 U.S. 494 (1977). *Compare Smith v. Organization of Foster Families*, 421 U.S. 816 (1977). In the social welfare context, this Court has been reluctant to attribute to Congress a purpose contrary to perceived dominant social values, absent a clear indication that Congress intended such a result. *New York State Dept. of Social Services v. Dublino*, 413 U.S. 405, 413 (1973); *Carleson v. Remillard*, 406 U.S. 598, 604 (1972); *Woodward v. United States*, 341 U.S. 112, 113 (1951). See also *Church of the Holy Trinity v. United States*, 143 U.S. 457, 459 (1892).

tributes to Congress an intent contrary to the basic goal of family care for dependent children. Quoting S. REP. No. 165, 87th Cong., 1st Sess. 7 (1961), they state correctly that the purpose of the program was to "assist the states in the protection and care of children." *Id.*, at 7; State Brief at 29. They suggest therefore that any Congressional intent to strengthen family ties was secondary. *Id.* The point the state officials miss entirely is that, under the AFDC program, it is precisely parental or relative care that Congress judged to be the best means of protecting and caring for dependent children. *See* pp. 15-17, *supra*. It did not abandon that judgment when it established the AFDC-Foster Care Program.

"[I]n the absence of an unmistakable directive," this Court will not construe a federal statute "in a manner which runs counter to the broad goals which Congress intended it to effectuate." *FTC v. Meyer*, 390 U.S. 341, 349 (1968). In reading "foster family home" to exclude relative homes, the state attributes to Congress, in one subsection of Section 408(a), an intent to legislate significantly different treatment to two classes of children identically situated as to need, in a program structured to assist the states to meet that common need for special care and protection. The state also attributes to Congress an intent to discourage relative care of dependent children in a program established to assist the states in providing the most suitable care to children, neglected in and removed from their homes; but Congress had always judged relative care of dependent children to be the care most suitable for them outside the parental home. In this case, the state's policy kept Sherry Robertson in an orphanage, the environment Congress considered least suitable for dependent children. The state officials' reading of "foster family home" more than "runs counter" to the "broad goals" of the Foster Care Program. *Id.* It wholly frustrates them.

G. Under Section 408, Congress vested the responsibility for placement of an eligible child with a state welfare agency, Section 408(a)(2), and provided that state qualitative standards were to determine the suitability of a home to provide foster placement. Section 408 thus does not define foster family home any more specifically than to require that (1) it must meet state licensing standards; and (2) that it can be the home "of any individual." No specific classes of homes (*e.g.*, relative, non-relative) are excluded from Congress' understanding of "foster family home," except unsuitable ones. There was simply no need to anticipate all possible criteria a state might use to define a suitable foster home.

In considering other amendments to the Social Security Act in 1967, simultaneously with the Foster Care Amendments discussed above, however, Congress encountered a context where specific recognition of the home of a relative as a foster family home was necessary. The 1967 amendments created a new Work Incentive Program ("WIN"), Pub. L. No. 90-248, § 204(b), 81 Stat. 890 (1968). Under WIN, Section 402(a)(19), 42 U.S.C. § 602(a)(19), an AFDC caretaker relative (in the basic program) who refused to cooperate with various job placement efforts would be denied benefits on his or her own behalf. Section 402(a)(19)(F)(i). But Congress recognized that it was inappropriate to deny AFDC benefits to any AFDC recipient child living with the relative:

> [I]f the relative makes such refusal, such relative's needs shall not be taken into account [in determining benefits] . . . and aid for any dependent child in the family in the form of payments of the type described in section 406(b)(2) . . . or *section 408* will be made.

Section 402(a)(19)(F)(i) (emphasis added). The reference to "payments . . . described in section 406(b)(2)" is to

AFDC protective payments to an individual other than the caretaker relative on behalf of children living with that relative, when the relative has been determined incapable of managing the AFDC benefits. The reference to payments under Section 408 is to Foster Care benefits.

This provision can only have been directed at one or both of two possible situations, either of which embodies an explicit Congressional recognition of a relative home as a "foster family home." The first situation is that of a non-cooperating parent of children receiving aid under the regular AFDC program, (*i.e.*, for her own son or daughter) who might also be a foster parent of a related child (*e.g.*, a niece) placed in the home under Section 408 (*i.e.*, his or her home would be a "foster family home"). In this situation, Section 402(a)(19)(F)(i) foreclosed two possible actions states might take with regard to the Section 408 foster children placed in the related foster home. The WIN requirements only apply to some dependent children and to relatives themselves receiving aid based on their relationship to the child. Section 402(a)(19)(A).[33] A state might attempt to assert that, because the higher Foster Care benefits Congress encouraged the states to pay under the 1967 amendments were aimed at assuring the quality of a broad range of conditions in the home, rather than (as in regular AFDC) meeting the subsistence needs of the child, a Section 408 payment was a benefit to the relative, subject to reduction or termination for non-participation in WIN. Congress therefore precluded any such attempt to affect the Section 408 benefits. In addition, Congress assured that where the adult recipient had in her care

[33] Thus the link to § 408 in § 402(a)(19)(F)(i) cannot concern a situation in which a child is living in a non-relative home, since WIN would not apply to the § 408 foster parent in this instance.

both her own children and a related foster child, no children's benefits, under either Section 406 (for her own children) or 408 (for the related foster child) would be terminated. This was necessary to protect all children in the not-uncommon situation of an AFDC parent also caring for an AFDC-Foster Care child. Both the House and Senate Reports describe the provisions requiring a continuation of aid to the dependent child living in the non-cooperating relative's home as requiring that "aid will be denied for any dependent child in the family *other than* payments described in section 406(b)(2) . . . *or aid under Section 408*" (emphasis added). H. R. REP. No. 544, 90th Cong., 1st Sess. 178 (1967); S. REP. No. 744, 90th Cong., 1st Sess. 285 (1967).[34]

The second situation is that an AFDC caretaker relative's refusal to cooperate might be viewed as symptomatic of generally unsuitable home conditions, and that the state welfare agency would then seek to remove the child from the home. In this situation, Section 402(a)(19)(F)(i) is a Congressional mandate that the child removed from the home be provided AFDC-Foster Care benefits under Section 408. The latter would, of course, require that the child of a parent who refused work could only be removed from the home after an independent judicial determination of the home's unsuitability. In an area where some state

[34] HEW and the Department of Labor have both promulgated regulations governing the WIN program which also seem to anticipate that the provision for Foster Care benefits under § 402(a)(19)(F) is applicable to children who are in and remain in the home of the non-cooperating relative.

> If such individual found to have failed or refused to cooperate with WIN, without good cause, is a caretaker relative receiving AFDC, his needs will not be taken into account in determining the family's needs for assistance, and *assistance in the form* of protective or vendor payments or *of foster care will be provided to the remaining members of the assistance unit.*

45 C.F.R. § 224.51(a)(1) (1976); 29 C.F.R. § 56.51(a)(1) (1977).

officials might be tempted to use the removal of children as a device to punish a mother who refused to work, perhaps without adequate consideration for the best interest of the child, the requirement of a judicial determination would provide an important protection to those best interests. Congressional wariness of coerced removals of children from their own homes had prompted the judicial removal provision in the first instance. See p. 21, *supra*. Congress thus limited the agency's remedial action either to continuing payments to the child *in the home* (by protective payments and/or foster care payments) or to providing Section 408 Foster Care benefits *outside the home*, in a "foster family home."[35] But if Section 408 Foster Care benefits were required to be provided to *any* child placed outside his home, then this must mean that a "foster family home" is *any* home, including a relative home, in which a child judicially removed was placed.

Thus, from both perspectives, Section 402(a)(19)(F)(i) represents a specific Congressional recognition of the relative home as a "foster family home."

H. Reviewing Section 408 and related provisions of the Act thus demonstrates that Congress understood the term "foster family home" as the family home "of any individual" maintaining a suitable home for a foster child, under applicable state standards. Congress did not intend to interfere in a state's determination as to what the most suitable placements for foster children might be; its primary concern was to assist the state in providing the most suitable care available for a neglected and abused child judicially removed from his home because

[35] The § 406(b)(2) protective payments for the child alone obviously were not the intended relief for a child removed and placed with a new relative, since in such a home there would be no reason to restrict payments to only the child or to make them "protective."

of unsuitable conditions there. See pp. 20-7, *supra*. There was therefore no restriction on placement eligibility, except as might be defined by state qualitative licensing standards. "Any individual" included all individuals who were suitable foster parents, and whose homes were therefore suitable "foster family homes." Congress intended *all* groups of individuals to be included as potential foster parents under Section 408; no group was to be excluded so long as the homes met the state's own standards for suitable care for foster children. Illinois judges relatives to provide such suitable care, places hundreds of state wards in relative homes, and requires these homes to meet the state's own standards. Therefore in Illinois, the homes of relatives of otherwise eligible children are "foster family homes" within the meaning of Section 408; and these children are eligible for federal Foster Care benefits.

The state officials' contention that Congress intended to exclude relative homes from the definition of "foster family home" is based on the variously phrased argument that the Foster Care Program duplicates coverage under the basic AFDC program, State Brief at 15, 20, 26, 34-36, and that Congress intended to extend Foster Care eligibility only to persons who were not previously (and are not now) covered under the basic AFDC program. State Brief at 19, 21, 26, 31-32. The Court of Appeals characterized this argument as "an elaborate, indeed ingenious argument, regarding an implied legislative intent," *Youakim*, 562 F.2d at 487, and rejected it.

Coverage of children living with relatives under the Foster Care Program does not duplicate coverage available under the basic AFDC program. Eligibility for Foster Care is defined by additional eligibility criteria involving a court-ordered judicial removal from

a child's home because of neglect or abuse, and state custody. Sections 408(a)(1), (2). The Foster Care Program provides a distinct set of benefits and services tailored to meet the special needs of neglected, exploited, or abused wards of the state, which benefits and services are in significant respects different from and superior to those offered under the basic AFDC program. In all participating states, it provides higher cash benefits, and intensive services, including services to the original parent aimed at reuniting the foster child with his parent, not available under the basic program. These provisions are responsive to the special needs of foster children, and the higher costs of caring for them. This has been so since the establishment of the Program. *See* p. 25, *supra.*

Further, while Congress, in establishing the Foster Care Program, certainly intended to provide Foster Care benefits to children who had not previously been covered under the AFDC program, its doing so was only one means by which to achieve its primary purpose under the Program. This purpose was to help assure all abused and neglected AFDC children of the most suitable care outside their own homes, if removal from their homes was necessary.

The state officials cite *Burns v. Alcala*, 420 U.S. 575 (1975), in support of their position. State Brief at 15. In *Burns*, the question was whether "unborn children" were "dependent children" within the meaning of Section 406(a), thus making pregnant women eligible for AFDC benefits. The major reason for making AFDC payments to expectant mothers on behalf of their unborn children would be to enable the mother to obtain adequate prenatal care. *Burns*, 420 U.S. at 583 n.10. This Court considered the specific coverage of prenatal and postnatal health services under Title V of the Act,

created simultaneously with the enactment of the AFDC program in 1935, to be one element of "evidence" of a congressional intent not to include unborn children under AFDC. *Id.* One consideration in *Burns* was that Congress would not have established a separate program to meet the special needs of unborn children and their mothers, if it were simultaneously enacting another program which would meet those needs. This logic is inapplicable here. It does not support an inference that Congress, having enacted the AFDC Program in 1935, must be presumed to have made eligible in a new comprehensive Foster Care Program enacted 26 years later, only those neglected and abused children who had received no cash benefits under a different program enacted 26 years earlier. Such an inference would rest upon a hypothesis—unsupported by the statute or the legislative history—that Congress was without the initiative and resolution to enact a new program which would meet the common and unique needs of all impoverished, abused and neglected children, judicially removed from their homes. But Congress obviously can identify, and has here identified a particular problem, common both to a small number of persons previously eligible for lesser benefits under an existing program and a larger number of persons who are not, and can formulate a new program for which both groups are eligible on the basis of shared characteristics set forth in detail in the statute.[36]

[36] It has done so in other contexts. It enacted, in the same bill as the Foster Care Program, the AFDC-Unemployed Parent ("AFDC-U") program. Act of May 8, 1961, Pub. L. 87-31 § 1, 75 Stat. 75. Under that program, § 407, 42 U.S.C. § 607 families who had been and remained covered by the federal-state program of Unemployment Compensation [Section 301 *et seq.*, 42 U.S.C. §§ 501 *et seq.* (1970)], see Section 407(d)(3) and *Philbrook v. Glodgett*, 421 U.S. 707 (1975), *and/or* the basic AFDC program, (*i.e.* a child who had been residing with a

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The state officials also contend that the Section 408(f)(1) provision relating to placement in the home from which a child was removed or of a "relative" "conclusively establish[es] that [AFDC] foster care is simply not considered to be related care." State Brief at 20. They argue that Congress could not have intended to make relatives eligible for AFDC-Foster Care if that section required them to provide services making possible placement in the "home of a relative."

This simply reads too much into Section 408(f)(1). As the State officials recognize, State Brief at 20-21, Section 408(f)(1) sets forth the goals of long range planning for the "placement needs" of the foster child. *See also* HANDBOOK § 3453(9) (1963) (describing the Section 408(f)(1) services as involving the development of "permanent and suitable plans" for the foster child). Section 401 provides that the purpose of the AFDC program is to "encourage the care of dependent children in their own homes or in the homes of relatives." Accordingly, the first long range goal is to return the foster child to the home from which he has been removed, usually that of his parent(s). Section 408(f)(1) thus requires that "services [be] provided which are designed to improve the

[36] *continued*
single unemployed parent), were eligible for aid. In this context, the logic of the state's position is that if a state established higher benefits for the AFDC-U program than for the basic program, *e.g.*, to cover the expenses of looking for employment, it could deny a family consisting of a single unemployed parent and a child such benefits, on the theory that they were also eligible for the (lower) benefits of the basic program. Similarly, in Title XVI of the Act—Congress enacted the Supplemental Security Income program for the needy, aged, blind and disabled. Act of October 30, 1972, Pub. L. No. 92-603, § 301, 86 Stat. 1465. In addition to newly eligible groups, this program, §§ 1181 *et seq.*, 42 U.S.C. §§ 1381 *et seq.*, includes disabled children under the age of 18 who previously had been eligible because of their age and need for AFDC benefits. Congress redefined their eligibility and improved their benefits by superseding the prior criterion for their eligibility (age) and recognizing a more refined basis for eligibility (disability), predicated on a greater need.

conditions in the home from which he was removed." But a foster child's permanent return to the home from which he was removed may not be possible: conditions in that home may not "improve." In this circumstance, proper long-range planning for the child's permanent needs would require that efforts be directed towards another type of permanent placement. Under Section 401, the preferred permanent placement in these circumstances must be in the "home . . . of relatives." Accordingly, Section 408(f)(1) provides for services to "make possible" placement in the "home of a relative" on a permanent basis, with the cessation of state wardship after a finding that Section 408 benefits and services are no longer necessary.

The reference in Section 408(f)(1) to placement "in the home of a relative" is therefore consistent with reading "foster family home" to include relative homes. In this context, Section 408(f)(1) simply assumes what is otherwise clear: that Section 408 placement in any particular foster home, whether that of a relative or non-relative, is not "permanent" so long as the state is providing temporary foster care and exercising legal control over the child. For a placement to be, or become, permanent, the relative in whose home a neglected child is placed must be willing to accept the child on a permanent basis, and the state must conclude that a permanent placement in that home is appropriate for the child and thus relinquish its wardship. Unless both these conditions are met, the state agency should provide services making possible a permanent placement in the home from which he was removed or in the home of another relative.[37]

[37] The state officials erroneously characterize this as "mandat[ing] the removal of a child from AFDC-Foster Care [in a relative's home] for placement in another relative's home as

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Moreover, the subsections of Section 408 regarding federal funding of these special services also support the foster children's position. As the Court of Appeals noted, *Youakim*, 562 F.2d at 489-90, subsections 408(d) and (f) are linked. Subsection (d) provides that the "services described in (f)(2) shall be considered as part of the administration of the State plan for purposes of Section 403(a)(3)." The services described in (f)(2) are the services of the Title V public welfare agency "in placing such a child in a foster family home." The purpose of subsection (d) was to make such services eligible for the 50% federal matching share then available under Section 403(a)(3). Without such a provision, the services described in (f)(2) would not have qualified for any AFDC funds because they would not have been services of the "state agency" administering the Title IV AFDC program, as otherwise required by Section 403(a)(3). It was particularly appropriate to provide federal matching funds for the Title V agency providing such services, since Congress considered placement services to be "necessary . . . for the proper . . . administration of the State Plan [for AFDC, including AFDC-Foster Care]." In 1961 and today, such services are defined both in § 403(a)(3) and by reference to Section 402(a)(14) to include "services" provided to "maintain and strengthen family life." But under the state officials' reading of Section 408, "proper . . . administration" of the Foster Care Program would preclude the placement of a foster child in the manner best calculated to "maintain and

[37] *continued*
soon as possible." State Brief at 23. But § 408(f)(1) does not require removal from a relative's home any more than it does from a non-relative's home. It requires only that services be provided to "make possible" return to the home from which the eligible child was removed, or (permanent) placement in a relative's home. If such an alternative placement is inappropriate "to the individual child's needs," HANDBOOK, § 3452(12) (1963), it would not be required.

strengthen family life". Thus, as noted in the Solicitor General's Amicus Brief at 15-16, Section 408(f)(1) is not only consistent with coverage of the homes of relatives, but appears to support the preference for foster care by relatives. The Court of Appeals was therefore correct in concluding that the state's reading of Section 408(f)(1) was "tortured" and that "there is nothing" in that provision to suggest that foster children the state places in relative homes are ineligible for the Foster Care Program. *Youakim*, 562 F.2d at 490.[38]

The state officials also argue, State Brief at 27-28, that the Section 408(f) services are intended for children living with non-relatives because Congress had before 1961 deemed such children living with non-relatives to be "completely distinct", State Brief at 27, from the class of needy children living with relatives, insofar as it met the needs of the former separately under Title V of the Act. The import of this suggestion is apparently that, having already deemed the two groups to be "completely distinct," Congress kept the two groups distinct when it enacted the Foster Care Program. Title V child welfare services were *not*, however, restricted to children living with non-relatives. Section 521 (repealed, 1967; current version at 42 U.S.C. § 620 (1970)) provided, in relevant part for:

[38] Similarly, as the Court of Appeals additionally noted, 562 F.2d at 490, § 408(c) specifies a condition which must be met before AFDC-Foster children are to be counted under § 403(a)(1)(A) for federal funding purposes; it requires individuals counted as AFDC-Foster Care recipients for a particular month not to be "otherwise" counted (for federal funding purposes) as regular AFDC recipients for that month. The possibility that AFDC-Foster children would be "double-counted" is present because under § 408(a)(4), all AFDC-Foster children are removed from (regular) AFDC homes during the course of any month. The significance of § 408(c) in this context is that it restates the § 408(a)(1) and (4) eligibility requirements, which the plaintiff class meets.

> [W]elfare services (hereinafter . . . referred to as "child public welfare services") for the protection and care of homeless, dependent, and neglected children, and children in danger of becoming delinquent . . . .

"Dependency," of course, is the definition for the regular AFDC program of a child living with a parent or relative. Whether children were within the class of persons receiving Title V child welfare services, thus did not turn on whether they were living with non-relatives,[39] or, for that matter, on financial need. If the pre-1961 provision of services under Title V to neglected children has any relevance to the question here, it shows a consistent Congressional intent to consider all neglected children, living with relatives or non-relatives, as one class with respect to the particular type of deprivation (neglect in the home) prompting eligibility and particular services.

Appellants also suggest that the higher benefits and services available under Foster Care create a "financial incentive" for relatives to refrain from caring for needy children living in unsuitable homes, until they are judicially removed from their homes. They assert that "this procedure, given its possible traumatizing effects, can never be in the best interests of the child," State Brief at 26, and argue that Congress could therefore not have intended any such results.

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[39] Nor, contrary to what might be inferred from the state's presentation, State Brief at 27-28, was the Foster Care Program a replacement program for the Child Welfare Service Provisions of Title V. Sections 521-8 of the Act survived the enactment of § 408. The Title V Child Welfare Service provisions were repealed in the Social Security Amendments of 1967, Pub. L. No. 90-248, § 240(e)(1), 81 Stat. 915 (1968). But those amendments simultaneously provided for the Child Welfare Services under a new Title IV-B of the Act, Pub. L. No. 90-248, § 240(c), 81 Stat. 911 (1968).

No such financial incentive exists under the statute. In 1967, Congress amended Section 408 to permit Foster Care eligibility even if a child were not living in the home from which he was judicially removed at the time the relevant judicial proceedings were initiated. Thus a relative who believed that the state might initiate proceedings to take legal custody of a child from an unsuitable parent would not jeopardize the child's benefits under Section 408 by taking the child in (and receiving regular AFDC benefits for the child) prior to the initiation of those proceedings. (Even if a child, abused or neglected in his own home, were currently living with a relative, the state would retain its interest in initiating proceedings to assure that the original unsuitable parent could not reassert his or her [at that point legal] custody of the child.) And if the relative believed that such proceedings were unlikely, possible Foster Care eligibility would not be a factor in the decision to accept a child.

The state's implication that coverage of children in homes of relatives under the Foster Care Program invites collusion between parents and relatives to secure higher benefits and to neglect family obligations which prevented them from accepting a neglected or abused child under the regular AFDC program, is a classic "floodgates" argument made in a context where Congress has effectively precluded such collusion by the provisions for judicial removal and welfare agency responsibility for placement of the child in a suitable home. Judicial and agency control foreclose any significant possibility of abuse.

The state officials also rely on several excerpts from the Senate Hearings and Senate Report on the 1962 Foster Care amendments. *Public Assistance Act of 1962: Hearings on H.R. 10606 Before the Committee on Finance*, 87th Cong., 2d Sess. (1962); S. REP. No. 1589, 87th Cong., 2d Sess., (1962). All the references, State

Brief at 29-30, correctly state or suggest that prior to the establishment of the AFDC-Foster Care Program, the AFDC program provided benefits only to children living with relatives, and that the AFDC-Foster Care Program modified this policy. None of the comments support an inference, much less establish, that Congress meant to exclude children placed in relative homes from Foster Care eligibility.

Appellants rely on two references in the Senate Finance Committee Report on the 1967 amendments to Section 408. S. REP. No. 744, 90th Cong., 1st Sess. (1967). One of those amendments broadened eligibility for the Foster Care Program, by eliminating the restriction that, to be entitled for the program, a child must have been *receiving* AFDC in the month in which the judicial proceeding leading to his removal were initiated. Under Section 408(a)(4), as amended, a child must be *eligible* for AFDC in the month in which court proceedings are initiated, *or within six months prior thereto.* Social Security Amendments of 1967, Pub. L. No. 90-248, § 205(c), 81 Stat. 893 (1968). The state officials set out State Brief at 31, a portion of the Senate Report discussing this amendment, and characterize it as supporting their position. As the more complete text of the Senate Report[40] and the nature of the amendment make clear, however, the state misreads the relevant language.

[40] Appellants delete the sentence immediately preceding that part of the Report which they quote: "For the State to receive any Federal sharing, the children must be recipients of AFDC when the court issues its order. Your committee believes that this is an unduly limiting restriction and is proposing that this limitation be changed." They also delete two sentences following the section they quote: "Also included are children placed under court order who had been living with one of the specified relatives enumerated in the law within 6 months and would have been eligible upon application for AFDC if he were living with such relative and

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The state attempts to imply that the report language, "[f]ederal funds are not available . . . unless the child is in the home of a specified relative," refers to the home in which the child will be placed, and that "federal funds" means "regular Section 406 funds." But the full text demonstrates that the limitation on federal funding requiring the child to be in the home of the relative, and which Congress addressed, was the restriction that the child must have been receiving AFDC *in the home from which he was being removed*, and the timing restriction involved in removing him *from that same home*:

> [F]or the State to receive any Federal sharing, the children *must be recipients* of [regular] AFDC *when the court issues its order* . . . . [T]*his* is an unduly limiting restriction . . . . [C]ourts may be reluctant to place a child in foster care because Federal funds are not available . . . *unless the child is in the home of a specified relative* [when judicial proceedings are initiated and a court order is issued]. *The proposed change would make the cost of caring for children in foster care subject to federal sharing . . . if the child would have been eligible for aid under the AFDC program* if an application had been made on his behalf. *Also included are children placed under court order who had been living with one of the specified relatives enumerated in the law within six months* and would have been eligible upon application for AFDC . . . [To be eligible for AFDC-Foster Care under the "proposed change" a] child *need not live with a relative* and may be in a foster family home or in a voluntary institution *at the time the court makes its decision* (emphasis added).

[40] *continued*
were removed from the home of such relative by order of the court. . . . The child need not live with a relative and may be in a foster family home or in a voluntary institution at the time the court makes its decision."
S. REP. No. 744, 90th Cong. 1st Sess. 164 (1967).

Thus Appellants' assertion that "the courts' reluctan[ce]" [referred to in the Senate Committee Report] stemmed from the fact that foster care placement meant placement in unrelated homes, with the consequent loss of federal assistance," State Brief at 31, whereas "if foster care placement was viewed as placement with a relative, the courts would not have hesitated to place a child in foster care since federal funds would have been available," *Id.*, is simply wrong. The requirement at issue was that the child *be receiving* regular AFDC (and necessarily living with relatives) *in the month* in which the judicial proceeding leading to his *removal* was initiated, a requirement which had inhibited courts from *placing* children in foster care (related or unrelated) because, unless the dependent child met this limiting requirement, he was ineligible for the federally-funded AFDC Foster Care Program, *regardless of placement.* This is why the courts were "reluctant."

This is clear as well from the year the amendment was considered. The suggestion that the courts' "reluctance" stemmed from the non-availability of federal funds in non-relative homes founders on Congress having authorized funds in such homes in the original Foster Care legislation. In participating states it had been untrue for six years that federal funds were unavailable in the home of a non-relative. The State's error, therefore, is in trying to change the meaning of the referenced paragraphs by arguing the language of 1967 in the context of 1961. The Report concerns not placement, as the state implies, but conditions of removal.

The state officials also misinterpret that part of S. REP. No. 744, 90th Cong., 1st Sess. (1967), which is set out at its brief at 23. In 1967, the Foster Care Program was not mandatory for the states; nor did the federal government provide any higher federal matching share

for Foster Care benefits than for regular AFDC benefits. The majority of states did not participate in the Foster Care Program at all, *see* p. 41, *supra*, and those that did would presumably raise Foster Care benefits if the federal share were raised. It is in this context that the Committee's comments[41] must be considered.

The Committee noted that the "AFDC program already offer[ed] an opportunity for states to receive Federal financial assistance in the cost of care for many children . . . unable to live with their parents," *i.e.*, foster children. This was so: non-participating states received federal assistance under the basic AFDC program to care for foster children, *if* a relative could be persuaded to accept responsibility for care of the neglected child in his home, given its great cost, S. REP. No. 744, 90th Cong., 1st Sess. 164 (1967), and his other financial obligations, HANDBOOK § 3435.3 (1947). That is, "[f]ederal sharing is available to reimburse the relative

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[41] Appellants omit two sentences from the first referenced paragraph which they quote: "Thus, if children are deprived of parental support or care for the reasons now available to States under title IV, Federal sharing is available to meet the cost. It is not necessary for the relatives who, under State law, are not legally responsible for support, to meet the test of need applicable under the State AFDC plan, if they are caring for children who are eligible under the plan." These omitted sentences appear in the Report at the first ellipsis in the text as quoted by appellants.

Appellants delete one sentence from the second paragraph which they quote: "Effective July 1, 1969, State plans would have to provide for foster care under these terms. Federal sharing will be possible in payments up to $100 a month (on an average basis) for children in foster care. The committee believes that these liberalizations will be of material assistance to States and localities and will facilitate plans being developed for children based on the need of the child rather than the fiscal condition of the local government." This omitted sentence appears at the second ellipsis in the text as quoted by the appellants.

S. REP. No. 744, 90th Cong., 1st Sess. 164-65 (1967).

for the cost of providing a home for the child." S. REP. No. 744, 90th Cong., 1st Sess. 164 (1967). The committee then stated that it "believed that *greater use* could be made of these present provisions of the AFDC program in this respect," *i.e.*, the provisions providing for relative care of foster children. And in the next two sentences it specified the two measures under the Committee bill which would result in "greater use" of relatives *as foster parents*. First, federal sharing for *Foster Care* benefits would be made higher than sharing for basic AFDC benefits, thus encouraging the states to pay higher benefits to Section 408 foster parents (including relatives) than to caretakers under the basic program. Second, the program would be mandatory in all states participating in the basic AFDC program; thus, the anticipated higher Foster Care benefits would be extended to (relative) foster parents in all states, not just in the minority of states then choosing to participate in the program. The payment of *higher Foster Care* benefits in *all* states would enable the "greater use" of relatives as Section 408 foster parents, than the existing law made possible.

The state officials' reliance on the referenced paragraphs, State Brief at 24, is therefore misplaced. The Committee is setting forth two provisions "under the Committee bill" which, *inter alia*, would encourage "greater use" of relatives as Section 408 foster parents in all states. To read the report otherwise, makes the Committee statement that "greater use could be made" of the provisions for relative care of foster children, precatory, and unrelated to the two sentences immediately following.

VII.

THE DEPARTMENT OF HEALTH, EDUCATION AND WELFARE'S ADMINISTRATIVE CONSTRUCTION OF SECTION 408 OF THE SOCIAL SECURITY ACT AUTHORITATIVELY SUPPORTS THE CONCLUSION THAT ILLINOIS CANNOT DENY AFDC-FOSTER CARE ELIGIBILITY TO OTHERWISE ELIGIBLE FOSTER CHILDREN SOLELY BECAUSE IT PLACES THEM IN THE HOMES OF RELATIVES.

In vacating the original three-judge Court opinion in this case, this Court, referring to HEW's position on the question of statutory construction presented here, stated that the "interpretation of a statute by an agency charged with its enforcement *is a substantial factor* to be considered in construing the statute." 425 U.S. 231, 235 (1976), citing, *inter alia*, *New York State Department of Social Services v. Dublino*, 413 U.S. 405, 421 (1975) (emphasis added). This Court has consistently adhered to the "venerable principle that the construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong," *Red Lion Broadcasting Corp. v. F.C.C.*, 395 U.S. 367, 381 (1969), even if the agency's interpretation is not the only reasonable one, *Udall v. Tallman*, 380 U.S. 1, 16 (1965). Moreover, this Court has deemed administrative agency interpretations to be especially persuasive where the agency has proposed the provision's enactment to Congress, *United States v. American Trucking Ass'n*, 310 U.S. 534, 549 (1940), where the agency has "cooperated in developing" it, *Adams v. United States*, 319 U.S. 312, 315 (1943), or where the interpretation is a matter of "public record," *Udall v. Tallman*, 380 U.S. 1, 17-18 (1965), so that Congress may be presumed to have acted to correct the interpretation if it disagreed. Here HEW was involved in proposing the Foster Care Program, and certainly cooperated in its development. *See* pp. 17-19, *supra*. Moreover, HEW's

administrative construction has been a matter of public record. HEW Program Instruction APA-PI-75-9 (1974); *Youakim v. Miller*, 425 U.S. 231, 235 (1976).

HEW's relevant interpretation of Section 408 is clear, unequivocal, and "focus[es] closely on the operative impact" of the provision at issue in this action. *Weinberger v. Salfi*, 422 U.S. 749, 758 n.6 (1975). It wholly supports the foster children's position. HEW Program Instruction APA-PI-75-9 (1974) (A. 48.).

HEW's Program Instruction was issued "to resolve the problem of some states not licensing or approving the homes of non-legally liable relatives as foster care homes even though suitable foster care could be provided in the homes." *Id.*[42] It was the agency's "first and only" explicit national pronouncement on the question presented here. Brief for the United States as Amicus Curiae at 49. *See Great Northern R. Co. v. United States*, 315 U.S. 262, 275 (1942). But it by no means represented a departure from the agency's previous official operative interpreta-

[42] The Instruction was also issued in light of two federal district court decisions, referred to in the Instruction, which had ruled state policies excluding otherwise eligible children placed in relative homes from Foster Care eligibility to violate the Act. The two decisions were *Clampett v. Madigan*, S.D.S.D., decided May 24, 1973 (1972-74 T.B.), CCH Pov.L.Rptr. ¶ 17,-979, and *Jackson v. Ohio Department of Public Welfare*, N.D. Ohio, Civil No. C 72-182, decided April 17, 1972 at Motion to Affirm, A. 30. Since these two decisions, several other courts, in addition to the district court and Court of Appeals below, have reached the same conclusion, *Jones v. Davis*, D. Ore., Civil No. 76-805, decided January 31, 1977 [at Motion to Affirm, A. 13], appeal docketed, 9 Cir., no. 77-2254; *Thompson v. Department of Health and Social Services*, Cir. Ct. Wisc., decided January 9, 1976 [1974-76 T.B.], CCH Pov.L.Rptr. ¶ 22.303; *Alston v. Department of Health and Social Services*, Cir. Ct. Wisc., decided January 21, 1976 [1974-76 T.B.], CCH Pov.L.Rptr. ¶ 22,336; *see also Taylor v. Dumpson*, 362 N.Y.S.2d 888 (Sup.Ct. 1974), *rev'd. on other grounds* (mootness), 37 N.Y.2d 765 (1975). *Cf. Sockwell v. Maloney*, 431 F.Supp. 1006 n.3 (D. Conn. 1976) (Dicta), *aff'd.* 554 F.2d 1236 (2d Cir. 1977). There is no contrary judicial authority.

tion of the Act; on the contrary, it was issued expressly to enforce existing HEW policy in recalcitrant states, not to promulgate new policy for all states.[43] Thus, as the Solicitor General notes in his Brief at 18-19, HEW had informed individual states prior to 1974 that otherwise eligible children placed in relative homes were eligible for the Foster Care Program, and funded Foster Care benefits paid to such children.

While the state officials dispute HEW's interpretation of the Act, their arguments suggest the weakness of the state's position and reinforce the proposition that HEW's construction of the Act is entitled to substantial weight here. First, the state officials assert that HEW's position

[43] The state officials point to a 1971 letter of an acting regional commissioner of HEW's Social and Rehabilitation Service to one of the Division heads of the Illinois Department of Public Aid, as representing a previously contrary interpretation of the Act. State Brief at 32-33. But as the Solicitor General notes, Brief for the United States as Amicus Curiae at 18, the local HEW official wrote this letter without approval from HEW's General Counsel's office or from "any Department official in the national office." *Id.* The letter did not represent HEW's official policy, as applied nationally. *Id.*, at 18-19. The state officials' reliance on this deviant interpretation of national policy by a local official to undermine the authority of the HEW Program Instruction, citing *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976), is therefore misplaced. In *Gilbert*, this Court held that where the Equal Employment Opportunity Commission ("EEOC") was given no authority to promulgate rules and regulations pursuant to Title VII of the Civil Rights Act of 1964, an EEOC guideline prohibiting exclusion of pregnancy-related disabilities from coverage under private health insurance plans was not entitled to great deference, especially when two earlier official opinion letters issued by EEOC's General Counsel's Office enunciated a contrary position. *Gilbert*, 429 U.S. at 141-43. Even then, that Court refused to "wholly discount the weight to be given the [later] 1972 guideline." *Id.*, at 143. Here, Congress has given HEW specific authority to issue "rules and regulations" governing the AFDC program, § 1102, 42 U.S.C. § 1302 (1970), and there is no contrary policy interpretation from HEW's General Counsel's office, or from anyone else with authority to promulgate official national HEW policy.

"does not derive support from its own published regulations." State Brief at 33. Since HEW has specifically stated that its own regulations not only "support" the policy of requiring foster children living with related foster parents to be eligible for Foster Care benefits, but *require* it, HEW Program Instruction APA-PI-75-9 (1974), this argument carries no weight. *See Udall v. Tallman*, 380 U.S. 1, 16 (1965).[44]

Second, the state officials suggest that Section 408 itself is "unclear," State Brief at 22, or "ambiguous," Jurisdictional Statement at 11, and that it is both "necessary and appropriate" to construe Section 408 in light of "other sections of the federal welfare scheme." The foster children do not accept the state officials' characterization of the statutory language. But it is, of

[44] In any event, the inferences the state officials draw from the regulations which they discuss at State Brief, 34-36, are of no help to their case. Appellants characterize as "especially significant" 45 C.F.R. §§ 233.90(c)(1)(v)(B)(1), (2), which provides federal funding under the regular AFDC program for children living with specified relatives even while such children are under the court or state agency jurisdiction. From this regulation, the state infers that HEW is distinguishing between all children placed with relatives (including those under state custody) and all children not placed with relatives. But there is a large group of children removed from their own homes and under state agency control who—whether they live with relatives or non-relatives—are not eligible for foster care under § 408. These are children who were not eligible for regular AFDC in the homes from which they were removed; 45 C.F.R. § 233.90(c)(1)(v)(B)(1), (2), merely describes regular AFDC eligibility for those children. Similarly the conclusions they draw from 45 C.F.R. § 233.90 (c)(1)(v)(A)(1) merely reiterate their contention that because the children would be eligible for the regular AFDC program, they cannot be eligible for the Foster Care Program. The conclusion they draw from 45 C.F.R. § 220.19 repeats the argument derived from § 408(f)(1). Finally, appellants attach some significance to 45 C.F.R. § 233.90 (c)(2)(i) and (iii), prohibiting the "double-counting," for federal reimbursement purposes, of children receiving regular AFDC benefits and Foster Care benefits in the same month. This regulation tracks § 408(c) which, as explained at n. 38, *supra*, inferentially supports the foster children's position.

course, precisely "where the relevant statutory language is unclear or susceptible of differing interpretations," *Shea v. Vialpando*, 416 U.S. 251, 262 n.11 (1974), that this Court finds it appropriate to consider and defer to federal administrative agencies' interpretations of the statutes they are charged with executing. *See Udall v. Tallman*, 380 U.S. 1, 16 (1965). With respect to the state officials' suggestions that Section 408 must be construed with other provisions of the Act, HEW's interpretative effort to "harmonize an obscure enactment with the basic structure of the program it administers" has been accorded great respect by this Court. *Rosado v. Wyman*, 397 U.S. 397, 415 (1970).

HEW's interpretation of Section 408 of the Act authoritatively supports the Judgment of the Court of Appeals.

CONCLUSION

The Judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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INDEX TO SUPPLEMENT

The following provisions are included in this Supplement, as indicated: PAGE

U.S. CONST. art. VI, cl. 2, the Supremacy Clause S-1

Social Security Act of 1935, Title IV, 49 Stat. 627, as amended, 42 U.S.C. §601 *et seq.* (1970 & Supp. V 1975):

- Section 402(a)(10), 42 U.S.C. §602(a)(10) (1970 & Supp. V 1975) S-1
- Section 402(a)(19)(F), 42 U.S.C. §602(a)(19)(F) (1970 & Supp. V 1975) S-1
- Section 425, 42 U.S.C. §625 (1970) S-3

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DCFS, CHILD WELFARE MANUAL 2.8.2 (1976) S-8

SUPPLEMENT

U.S. CONST. art. VI, cl. 2, the Supremacy Clause:

> This constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and judges in every state shall be bound thereby, any thing in the constitution or laws or any state to the contrary notwithstanding.

Social Security Act of 1935, Title IV, 49 Stat. 627, 42 U.S.C. §601 *et seq.* (1970 & Supp. V 1975):

Section 402(a)(10), 42 U.S.C. §602(a)(10) (1970 & Supp. V 1975):

> A State plan for aid and services to needy families with children must:
>
> • • •
>
> (10) provide, effective July 1, 1951, that all individuals wishing to make application for aid to families with dependent children shall have opportunity to do so, and that aid to families with dependent children shall be furnished with reasonable promptness to all eligible individuals. . . .

Section 402(a)(19)(F), 42 U.S.C. §602(a)(19)(F) (1970 & Supp. V 1975):

> A State plan for aid and services to needy families with children must:
>
> • • •

(Supplement)

(19) provide—

• • •

(F) that if and for so long as any child, relative, or individual (certified to the Secretary of Labor pursuant to subparagraph (G)) has been found by the Secretary of Labor under section 633(g) of this title to have refused without good cause to participate under a work incentive program established by part C with respect to which the Secretary of Labor has determined his participation is consistent with the purposes of such part C, or to have refused without good cause to accept employment in which he is able to engage which is offered through the public employment offices of the State, or is otherwise offered by an employer if the offer of such employer is determined, after notification by him, to be a bona fide offer of employment—

(i) if the relative makes such refusal, such relative's needs shall not be taken into account in making the determination under clause (7), and aid for any dependent child in the family in the form of payments of the type described in section 606(b)(2) of this title (which in such a case shall be without regard to clauses (A) through (E) thereof) or section 608 of this title will be made;

(ii) aid with respect to a dependent child will be denied if a child who is the only child receiving aid in the family makes such refusal;

(iii) if there is more than one child receiving aid in the family, aid for such child will be denied (and his needs will not be taken into account in making the determination under clause (7)) if that child makes such refusal; and

(Supplement)

(iv) if such individual makes such refusal, such individual's needs shall not be taken into account in making the determination under clause (7);

except that the State agency shall, for a period of sixty days, make payments of the type described in section 606(b)(2) of this title (without regard to clauses (A) throuh (E) thereof) on behalf of the relative specified in clause (i), or continue aid in the case of a child specified in clauses (ii) or (iii), or take the individual's needs into account in the case of an individual specified in clause (iv), but only if during such period such child, relative, or individual accepts counseling or other services (which the State agency shall make available to such child, relative, or individual) aimed at persuading such relative, child, or individual, as the case may be, to participate in such program in accordance with the determination of the Secretary of Labor;

Section 425, 42 U.S.C. §625 (1970):

For purposes of this subchapter, the term "child-welfare services" means public social services which supplement, or substitute for, parental care and supervision for the purpose of (1) preventing or remedying, or assisting in the solution of problems which may result in, the neglect, abuse, exploitation, or delinquency of children, (2) protecting and caring for homeless, dependent, or neglected children, (3) protecting and promoting the welfare of children of working mothers, and (4) otherwise protecting and promoting the welfare of children, including the strengthening of their own homes where possible or, where needed, the provision of adequate care of children away from their homes in foster family homes or day-care or other child-care facilities.

(Supplement)

Department of Health, Education and Welfare Information Memorandum APA-IM-71-7 (April 22, 1971):

DEPARTMENT OF HEALTH, EDUCATION
AND WELFARE
SOCIAL AND REHABILITATION SERVICE
WASHINGTON, D. C. 20201

INFORMATION MEMORANDUM
APA-IM-71-7
April 22, 1971

TO: STATE AGENCIES ADMINISTERING APPROVED PUBLIC ASSISTANCE PLANS

SUBJECT: AFDC-FC Clarification of the Meaning in Section 408 of the Social Security Act of the Licensing or Approval of Foster Family Homes.

CONTENT: See Attached Material

OTHER INFORMATION: The existing regulations on this subject are codified in Title 45, Chapter II, Part. 233.110 of the Code of Federal Regulations.

INQUIRIES TO: SRS Regional Commissioners

/s/ John L. Costa
Commissioner
Assistance Payments
Administration

(Supplement)

DEPARTMENT OF HEALTH, EDUCATION
AND WELFARE
SOCIAL AND REHABILITATION SERVICE
WASHINGTON, D. C. 20201

AFDC-FC Clarification of the Meaning in Section 408 of the Social Security Act of the Licensing or Approval of Foster Family Homes

This is to clarify the meaning in section 408 of the Social Security Act of the statement: "For the purposes of this section, the term 'foster family home' means a foster family home for children which is *licensed* by the State in which it is situated or has been *approved,* by the agency of such State responsible for licensing of homes of this type, as meeting the standards established for such licensing." (Emphasis supplied.) In order to interpret this provision, it must be read in context with the other related provisions of the Act.

Section 402 (a)(20) requires every State AFDC plan to provide, effective July 1, 1969, for AFDC in the form of foster care in accordance with section 408. This means that all those who meet the expanded definition of "dependent child" contained in section 408 (a) and who are otherwise eligible must be considered eligible for AFDC-FC under the State plan.

This requirement, combined with the Statewideness requirement in section 402 (a)(1), means that the agency must place every child applying for AFDC-FC who meets the definition in section 408 (a) realistically on a Statewide basis. The agency must, therefore, have foster homes available for the eligible children whose placement and care are its responsibility.

(Supplement)

The agency may not escape its obligations under these statutory provisions by failing to license foster homes. Nor may the agency escape its obligation to comply with title VI of the Civil Rights Act of 1964 by refusing to license homes of those of a particular race, color, or national origin. If a child is eligible for AFDC-FC under section 408 (a), the State agency is required under section 402 (a)(20) to provide assistance for the child. If the child is living in a home which is not licensed or approved as defined in section 408, then the State will receive no Federal share under title IV-A in the assistance furnished the child, but the State is still required under its plan under IV-A to provide assistance with or without Federal financial participation for the child.

The above-cited definition of a "foster family home" describes such a home as one that has been licensed or approved. Therefore, the State does not have to license a home in order to receive a Federal share in assistance in behalf of a child living there. If a home may not be licensed under State law, the State licensing authority may approve a home as meeting the licensing standards and the State would then receive Federal matching in assistance to eligible AFDC foster children residing in that home.

(Supplement)

ILL. REV. STAT. ch. 23, §2217 (Supp. 1977):

(a) The Department must prescribe and publish minimum standards for licensing that apply to the various types of facilities for child care defined in this Act and that are equally applicable to like institutions under the control of the Department and to foster family homes used by and under the direct supervision of the Department. The Department shall seek the advice and assistance of persons representative of the various types of child care facilities in establishing such standards. The standards prescribed and published under this Act take effect as provided in "An Act concerning administrative rules", approved June 14, 1951, as amended, and are restricted to regulations pertaining to:

(1) The operation and conduct of the facility and responsibility it assumes for child care;

(2) The character, suitability and qualifications of the applicant and other persons directly responsible for the care and welfare of children served;

(3) The general financial ability and competence of the applicant to provide necessary care for children and to maintain prescribed standards;

(4) The number of individuals or staff required to insure adequate supervision and care of the children received;

(5) The appropriateness, safety, cleanliness and general adequacy of the premises, including maintenance of adequate fire prevention and health standards conforming to State laws and municipal codes to provide for the physical comfort, care and well-being of children received;

(6) Provisions for food, clothing, educational opportunities, program, equipment and individual sup-

plies to assure the healthy physical, mental and spiritual development of children served;

(7) Provisions to safeguard the legal rights of children served;

(8) Maintenance of records pertaining to the admission, progress, health and discharge of children;

(9) Filing of reports with the Department;

(10) Discipline of children;

(11) Protection and fostering of the particular religious faith of the children served.

• • •

DCFS, CHILD WELFARE MANUAL 2.8.2 (1976):

When a relative home is being considered as a placement resource, the home must meet the minimum standards for foster family homes, although the home is not subject to licensing.

FOR ARGUMENT

Supreme Court, U. S.
FILED
OCT 26 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-742

JEROME MILLER, Individually and as Director of THE DEPARTMENT OF CHILDREN AND FAMILY SERVICES and THE DEPARTMENT OF CHILDREN AND FAMILY SERVICES of the STATE OF ILLINOIS.

Appellants.

vs.

MARCEL YOUAKIM and LINDA YOUAKIM individually and as foster parents, TIMOTHY ROBERTSON, a minor, by his sister and next friend LINDA YOUAKIM, MARY LOU ROBERTSON, a minor, by her sister and next friend LINDA YOUAKIM, LARRY ROBERTSON, a minor, by his sister and next friend LINDA YOUAKIM, and SHERRY ROBERTSON, a minor, by her sister and next friend LINDA YOUAKIM, and all others similarly situated,

Appellees.

On Appeal From the United States Court of Appeals for the Seventh Circuit

REPLY BRIEF FOR APPELLANTS

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On Appeal From the United States Court of Appeals for the Seventh Circuit

REPLY BRIEF FOR APPELLANTS

ARGUMENT

I.

THE ILLINOIS STATUTORY FOSTER CARE SCHEME IS CONSISTENT WITH THE PROVISIONS OF THE SOCIAL SECURITY ACT.

The State of Illinois recognizes that once a state decides to participate in the federal public welfare program, "aid to families with dependent children [must] be furnished with reasonable promptness to all eligible individuals." 42 U.S.C. § 602(a)(10); *Carleson* v. *Remillard,* 406 U.S. 598, 32 L. Ed. 2d 352 (1972). As is apparent in this case, Illinois does not deny public assistance to persons who care for related dependent children.

Likewise, it is not questioned that eligibility for AFDC or AFDC-FC is to be determined by reference to the federal eligibility standards rather than by each individual state's preference. (See Pl. Br. pp. 13-14; U.S. Br. p. 7). Simply stated, the question here is whether persons caring for needy dependent children are eligible for public assistance under the basic AFDC program, the more recently added AFDC-FC program or, as must logically follow from plaintiffs' position, both programs. The defendants maintain that the state has properly applied the federal eligibility standards to the plaintiffs in this case and appropriately found them eligible for AFDC benefits. Because public assistance is clearly available to persons situated like the plaintiffs in the basic program, Congress did not intend that they be covered again under the separate AFDC-FC program.

A.

Plaintiffs Are Clearly Eligible For Federal Assistance Under The Basic AFDC Program.

Plaintiffs do not deny that they meet the federal eligibility requirements under the basic AFDC program. For purposes of this case, only two conditions for eligibility exist under that program. First, a child must be deprived of parental support because of the death, continued absence or physical or mental incapacity of a parent. Without question, the minor plaintiffs meet this requirement. Secondly, a child must reside with his parents or certain specified close relatives. Because the minor plaintiffs live with their sister, they also meet this requirement. Since both conditions have been met, the plaintiffs are, therefore, eligible for welfare benefits under § 406.

Plaintiffs are eligible under the basic program despite the fact that the minor plaintiffs have been placed in the related home as wards of the state. A court ruling that a child should be removed from the home of a parent or relative and made a ward of the state does not now affect, and never has, a family's eligibility under the basic AFDC program. So long as a child lives in the home of a specified relative and has been denied parental support for any of the above-mentioned reasons, he is entitled to assistance under § 406. The federal regulations governing the basic AFDC program strongly support this position. These regulations consider a child to be "living with" a relative even though:

> (1) *He is under the jurisdiction of the court (e.g., receiving probation services or protective supervision); or*

(2) *Legal custody is held by an agency that does not have physical possession of the child.*

45 C.F.R., § 233.90(c)(1)(v)(B).[1]

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1. In their brief submitted to the Court of Appeals, plaintiffs dismissed this regulation as "irrelevant." Plaintiffs now argue that the regulation refers to a "large group of children" removed from their own homes and under state supervision who, whether living with relatives or non-relatives, are not eligible for foster care under § 408 because they were not eligible for regular AFDC in the homes from which they were removed; purportedly the above regulation merely describes regular AFDC eligibility for these children. (Pl. Br. p. 68) Plaintiffs cannot be suggesting that children removed from non-eligible homes and subsequently placed with non-relatives are made eligible under the regulation for regular AFDC assistance, since one of the specified requirements for AFDC is that a child live in a related home. Plaintiffs must be referring to children removed by court order from non-eligible parental homes and placed with relatives. If there is a deprivation of parental support in this situation for any of the reasons stated in the Social Security Act, such children are of course eligible for AFDC so long as they live with relatives. The regulation applies to all needy children, including plaintiffs, who live with relatives, even though legal custody is held by the state agency. It also clarifies that HEW does not regard a court order as the distinguishing factor for determining AFDC-FC eligibility, since that factor may be present when a child is entitled to AFDC.

The Solicitor General readily acknowledges that the above regulation does provide coverage under the basic AFDC program for a relative caring for a child held in legal custody of a state agency. (U.S. Br. pp. 12, 18) The fact that AFDC-FC coverage would "in these circumstances overlap with the basic AFDC coverage" constitutes the precise issue in this case, and cannot be dismissed simply by reference to HEW regulations allowing a family to choose whichever plan they find more desirable.

In short, the fact that the minor plaintiffs have been adjudicated state wards does not vitiate the reality that plaintiffs are literally covered under the basic AFDC program.

As plaintiffs note, Congress extended eligibility under the basic AFDC program in 1961 to "include" the child who lives with a specified relative, but who is deprived of parental support because of the unemployment of his father. (42 U.S.C. § 607) Even under this extended program, however, a child could receive assistance only if he was living with a relative. An entire group of needy dependent children, therefore, absent additional legislation, would have remained ineligible under the federal AFDC program. These are children who, although deprived of parental support because of the death, absence, incapacity, or unemployment of a father, are unable to live with relatives. The foster care program pertains directly to these children. While the basic AFDC program only provides aid to children who reside in the homes of relatives, § 408 changes the definition of a needy dependent child to *include also* one who would meet the requirements of § 406 or § 407, *except that he has been removed* from the home of a § 406 relative and has been placed in a "foster family home" or in a "child-care institution."

As plaintiffs correctly note, § 408 does not explicitly exclude related children from coverage under the foster care program. (Pl. Br. pp. 36, 47) This fact is, of course, in no way determinative of the issue involved here. The approach of presuming coverage under any federal assistance program has been firmly rejected by this Court, and the ordinary principles of statutory interpretation must be applied. *Burns* v. *Alcala*, 420 U.S. 575, 43 L. Ed. 2d 469, 475 (1975).

As previously discussed in the State's brief (pp. 21-22), these principles require that § 408 be read in conjunction

with § 406, and not as though the foster care provision stood in isolation, as is done by plaintiffs. Indeed, § 408 by its very terms necessitates a reference to § 406. Section 408(a) states that "notwithstanding Section 606(a)", the term "dependent child" shall "also include" a child removed from the home of a relative and placed in a foster family home or child care institution. Given its normal meaning, the phrase "also include" used in § 408 signifies an addition of some sort. In the context of the Social Security Act, related care was already covered under § 406; "also include" must, therefore, refer to the additional category of unrelated child care. As shown above, if a child is removed from the home of one § 406 relative and placed in the home of another § 406 relative, with or without a court order, he is entitled to AFDC assistance. The only reasonable explanation for the later enactment of § 408 is that Congress intended to reach a group of children not otherwise entitled to AFDC assistance—that is, needy dependent children who are placed somewhere other than in the home of a § 406 relative.

In addition, § 408(f) specifically requires assurance by the state that once a child is placed in a "foster family home," efforts will be made to either improve the conditions of the home from which he is removed or to otherwise "make possible his being placed in the home of a relative specified in section 606(a) of this title. . . ." 42 U.S.C. § 608(f). This is precisely the situation here: two of the plaintiff children had initially been placed in a foster home; pursuant to § 408(f), the state made it possible to place the children in the home of a relative specified in § 406(a)—their present home. Section 408(f) specifically refers to relatives' families as being a separate category from foster families. Under plaintiffs' construction that foster care is related care, the quoted portion of § 408(f) is rendered

meaningless. If Congress had intended that a separate category of "related foster parents" should constitute an exception to the clear language of § 408(f), it seems certain that Congress would have made some reference to this group of persons. As it now stands, the language of § 408(f) is simply extra verbiage if a child already lives in the home of a § 406 relative which is, at the same time, considered a foster family home.

Both plaintiffs and the Solicitor General (U.S. Br. p. 15) virtually ignore the vital role played by relatives in the maintenance of the family structure when discussing § 408(f). Thus, plaintiffs state on page 54 of their brief that the first goal of long range planning is to return the child to the home from which he is removed, "usually that of his parents." By repeatedly emphasizing the family ties between a child and his parent throughout their brief, and by referring merely implicitly to the role of relatives in the foster care scheme, plaintiffs attempt to establish that care by all persons other than parents constitutes foster care. Under plaintiffs' narrow interpretation that children be returned to the homes of their parents, a child's placement in the home of a relative would be a foster care measure. But this interpretation was clearly not the intention of Congress. Relatives actually stand on the same footing as parents in the foster care scheme. When a child is removed from a relative's home and placed elsewhere, the Social Security Act mandates that the same services be provided to improve the home of a relative as would be provided to improve a parental home if the child had been removed from that home.

Plaintiffs note that the home from which a child was removed cannot always be improved, and plaintiffs correctly state that in those instances child placement should be sought with another relative. (Pl. Br. p. 55) However, plain-

tiffs discuss only "permanent placement" with a relative. Neither § 408(f) nor any federal regulations require a child's placement with relatives to be permanent when the home from which a child is removed cannot be improved. Under § 408(f), it is sufficient that a child is placed "in the home of a relative specified in section 606(a)." As the HEW regulation discussed above makes unmistakably clear, a child will be living with a relative even if that child is under a court's supervision or is in the legal custody of a state agency. (45 C.F.R. § 233. 90(c)(1)(v)(B)). Furthermore, by making a clear distinction between a relative's home and an adoptive home, 45 C.F.R. § 220.19(d) leaves little doubt that placement with relatives need not be on a permanent basis. (See State Br. p. 36) Since the goal of the § 408 program is to aid the child *until* he can be placed with relatives, either on a permanent or temporary basis, it logically follows that the foster care itself is not provided by persons related to the child. In short, the goal of the § 408 program has been met and the child is not in need of foster care but can obtain aid under § 406. Since plaintiffs have been successfully placed by the state in the home of a relative after living in a foster family home, they are no longer foster children under the Social Security Act and are clearly entitled to benefits under § 406.

Assuming that the long range goal of foster care is the permanent placement of the child with a relative, plaintiffs' interpretation of § 408 allowing relatives to serve as foster parents frustrates that goal. If a relative could be a temporary foster parent under § 408, a child living with that relative could receive more aid than he could receive under the basic § 406 program. As a matter of simple economics, assuming that the child's home could not be improved, a relative would have no incentive to adopt the child or to

take permanent, non-supervised custody of him. In fact, there would be an economic incentive for the relative to help the child only on a temporary foster care basis. Similarly, any other relative would not want to adopt the child or take permanent custody of him if the child could obtain more money by living with another "foster relative." Furthermore, if a relative could receive more money under the foster care program, he would have no incentive to voluntarily care for the child under the § 406 basic AFDC program. Rather, that relative would be provided an incentive to wait until the child had been removed from the home of a parent or relative by court order and declared a ward of the state—a process which could adversely affect the child. These considerations provide additional proof that relatives' homes are not considered to be foster homes under the § 408 foster care program.

B.

Congress Did Not Intend That Plaintiffs Be Covered By Both § 406 and § 408.

Plaintiffs evade the fact that they are literally covered under § 406, and rely solely on § 408 to establish their eligibility for federal assistance. That section, standing by itself, does not clarify Congress' meaning of the term "foster family home." Thus, § 408(a) refers to a child who has been removed from a relative's home and placed in a "foster family home," without further explaining that term. Likewise, § 408(b) also includes "foster care" in the "foster family home of any individual" or "child-care institution." Finally, the last paragraph of § 408 simply defines a foster family home as a "foster family home for children" which is licensed or approved by the state. In deciding this case below, the Court of Appeals agreed that

Congress nowhere defined "foster care" for purposes of federal assistance. (J. S., App. B8-9) Without question, a determination of the issue involved in this case must go beyond an examination of § 408 and consider the interaction between § 406 and § 408.

The logical extension of plaintiffs' claim that they are entitled to foster care assistance is that they are covered in two areas of the federal welfare scheme—the basic AFDC program under § 406 and the foster care program under § 408. However, the fact that Congress explicitly provided AFDC for children living with relatives is evidence of a Congressional intent not to include such children in the AFDC-FC program. (See *Burns* v. *Alcala,* 420 U.S. 575, 43 L. Ed. 2d 469, 476 (1975)) While plaintiffs attempt to distinguish this case on the basis that prenatal services under Title V were provided "simultaneously" with AFDC coverage, there is nothing in *Burns* to indicate that this principle does not apply here.

Although plaintiffs are literally covered under the basic AFDC program, they contend that duplicate coverage does not exist, in view of the "additional eligibility criteria" under the foster care program of a court ordered removal from the home of a relative. (Pl. Br. pp. 51-52) This requirement does bar an entire group of children from federal assistance who are removed from their homes without legal action, and are placed in non-related homes. But the requirement does not in itself create plaintiffs' eligibility for foster care assistance. Again, children who were judicially removed from their homes and placed with relatives were eligible for federal assistance long before the foster care program came into being. As plaintiffs themselves note (Br. p. 21), the requirement of a judicial determination that a home is unsuitable was inserted into the foster care program to safeguard children against arbitrary re-

moval in situations where the state disapproved of certain practices within the home. In effect, the requirement simply places the burden on the state to produce sufficient evidence that a home is truly unsuitable. It is not the distinguishing factor for foster care eligibility. The recognition by the Solicitor General that AFDC-FC coverage does indeed overlap with the basic coverage if related persons are to be considered foster parents is certainly a more correct interpretation. (See note 1, p. 4 *supra*)

At the same time as plaintiffs deny duplicate coverage, they appear to suggest that related persons constitute a small group which is eligible for aid under two programs. (Pl. Br. p. 53)[2] This position undoubtedly emerges from

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2. The situation referred to by plaintiffs under the AFDC-U program (42 U.S.C. § 607), and decided in *Philbrook* v. *Glodgett,* 421 U.S. 707, 44 L. Ed. 2d 525 (1975), is not analogous to this case. (See Pl. Br. pp. 53-54). Under the subchapter IV categorical assistance program for aid to families with dependent children (42 U.S.C. § 601 et seq.), a child deprived of parental support because of the unemployment of his father is eligible for financial aid (42 U.S.C. § 607). Pursuant to § 407(b)(2)(c)(ii), AFDC benefits are terminated if the child's father received unemployment compensation under state or federal law. The federal-state unemployment compensation program, operated under subchapter III of 42 U.S.C. is separate and distinct from the subchapter IV AFDC program. In *Philbrook*, the State of Vermont terminated AFDC assistance if a child's father was merely eligible for unemployment compensation. This Court affirmed the lower court decision invalidating the Vermont statute and ruled that a state cannot deny aid under the AFDC categorical assistance program merely because an individual was eligible for a basic amount of aid under the unemployment compensation program.

Unlike that situation, § 406 and § 408 do not establish separate categorical assistance programs, but are rather

(Footnote continued on next page)

plaintiffs' repeated assertions that Congress enacted the foster care program in response to the special needs of children removed from their homes by court order by providing a distinct and superior set of services and benefits "tailored to meet the special needs of neglected, exploited, or abused wards of the state." (Pl. Br. p. 52) Simply stated, plaintiffs view the difference between § 406 and § 408 as a difference between the reasons for a child's deprivation of parental support. Allegedly, children who must be removed from their homes because of abuse and neglect share a "different and greater need" than is met under the basic AFDC program. (Pl. Br. p. 21) According to plaintiffs' theory, "need" under the basic program is only "economic support" because of the death, absence or incapacity of parents; the factor triggering foster care is not economic need, but rather the "special needs of children who have been so neglected in their own homes, that a court has ordered them removed from those homes." (Pl. Br. p. 22)

This theory suggests that Congress was primarily concerned with solving the problem of child neglect or abuse, rather than the problem of economic support of children removed from their homes. If this were the case, there would be no need for a child to be AFDC eligible before he can participate in the foster care program. Yet, Congress has specifically included the requirement that a child first be AFDC eligible. Therefore, the fact that a child is neglected or abused, and consequently removed from a relative's home, is irrelevant for federal welfare purposes. While

(Footnote continued from preceding page)

segments of one categorical assistance plan—the subchapter IV-A program for aid to families with dependent children. Clearly § 408 was not devised as an alternative to § 406, but as a means of including under the AFDC program those children not previously covered through § 406.

Congress was undoubtedly concerned with the plight of abused or neglected children, it is obvious that the neglect or abuse of children was not the catalyst for the enactment of the foster care program. Rather, Congress initiated the foster care program in response to a recognition that once neglected or abused children were removed from the home of a parent or relative, they were no longer entitled to AFDC benefits.

Additionally, plaintiffs overlook the fact that § 406(b) provides for medical care "or any type of remedial care recognized under state law," as well as money payments, on behalf of a needy dependent child or the relative with whom he lives. The only services provided to § 408 children which differ from those provided to § 406 children are found in § 408(f). As previously stated, that section merely provides that a state plan must make provision for periodic review of the child's need to live in a foster home or child-care institution; for assurances that the child receives proper care; for efforts that the home from which a child is removed is improved or he is otherwise placed with a relative; and for the use of certain state employees in placing the child in a foster home or child-care institution. Obviously, such a plan would not be required with respect to children eligible for regular AFDC, since these children are already living in the homes of relatives. Plaintiffs have not shown what other special services are available to children in foster care.

Plaintiffs erroneously state that "substantial additional cash money payments and specialized services" were made available under the foster care program from its inception, which were not provided under the basic program. (Pl. Br. p. 10) There is no indication anywhere that in 1961, when Congress amended Title IV of the Social Security Act to authorize federal matching funds for one year for needy de-

pendent children who were in foster care, any higher funds were allocated for the foster care program, or that Congress considered any unique needs of children removed from their homes by a court order. Congress simply recognized that these newly eligible children had as great a need for economic support as any other needy dependent child, and provided for it. Again in 1962, when Congress made the foster care program permanent, foster care assistance was provided on a matching basis on the recognition that foster care provided "an alternative to leaving children in unsuitable homes or caring for them elsewhere without federal participation." (S. Rep. No. 1589, 87th Cong. 2d Sess. (1962) U.S. Cong. & Adm. News V. 1, 1954.)

In 1967, Congress noted that "[f]oster care for children is relatively costly, and States have reported that they cannot finance it without some additional Federal help." (S. Rep. No. 744, 90th Cong., 1st Sess. (1967) U.S. Cong. & Adm. News V. 2, 3000.) In enacting the foster care program, Congress had already recognized that many needy dependant children are unable to live with their parents or relatives. Logic and established precedent dictate that foster care is more costly than related care for the reason that higher payments must be made to induce persons who have no familial interest in a child, and therefore no particular reason or incentive for caring for the child, to become foster parents. (See *Youakim* v. *Miller*, 374 F. Supp. 1204 (N.D. Ill. 1974))). As plaintiffs note on page 25 of their brief, all states participating in the federal foster care program had, since the beginning of the program, paid higher sums under that program than under the basic AFDC program. The more favorable federal matching in 1967 was a congressional effort to help the states attract as many homes of otherwise disinterested persons as possible, in accordance with the stated congressional purpose of obtaining the "best possible environment for the child." There is no indication that, by allocating higher payments to the states, Congress intended to change the basic structure of the federal assistance program which provided benefits to persons caring for related children, and to bring related persons within the coverage of both the § 406 and § 408 programs.

C.

Congress' Purpose In Enacting § 408 Was Simply To Provide Federal Assistance For A Group Of Children Not Previously Covered Under The AFDC Program.

All of the congressional statements accompanying the foster care amendments in 1961 and thereafter support the position that Congress did not regard related care as foster care for purposes of federal assistance under Title IV of the Social Security Act. (See State Br. pp. 26-32).[3]

In addition, both an analysis of the Flemming Ruling referred to by plaintiffs (Pl. Br. pp. 17-19) and portions of the Congressional Record relied on by plaintiffs support the interpretation that foster care was never intended to be related care for purposes of public welfare.

Insofar as the Flemming Ruling concerns this case at all, that Ruling was issued by HEW to counteract the position taken by several states that unsuitable homes (i.e. homes in which illegitimate children were born subsequent to the

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3. It may be noted that the district court below, 431 F. Supp. 40 (N.D. Ill. 1976), in part based its decision, without elaboration, on the legislative history of the Social Security Act as one ground for invalidating the Illinois foster care scheme. The weakness of this ground is indicated by the court of appeals' subsequent failure to adopt it. (562 F. 2d 483 (7th Cir. 1977)).

receipt of assistance) were ineligible for AFDC. In other words, states were attempting to use welfare legislation as a means to protect moral values of families. The Flemming Ruling represents HEW's considered judgment that welfare eligibility should not be controlled by the moral value judgments of the states, but rather by the deprivation of parental economic support for reasons designated in the Social Security Act.

The Flemming Ruling had ordered the states, as of July 1, 1961, to continue welfare assistance while making efforts to either improve the home from which a child was removed, or place the child elsewhere. As a result, the states were faced with the dilemma that, if a child were removed from an unsuitable home and placed in the home of a § 406 relative, federal aid would still be forthcoming; however, if the original "unsuitable" home of the child could not be improved and a § 406 relative could not be found, the states had two choices—either to leave the child in the "unsuitable home" to insure continued federal funding, or to place the child in a non-related home and lose federal AFDC matching funds. The problem was described as follows:

> At present under the aid to dependent children program the child must live in the home of a parent or a close relative.
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> * * *
>
> Care for children away from their own homes in foster family homes is not available throughout the country and varies widely among the localities. While Federal funds available through the child welfare services to States under title V are used for foster care of children to a limited extent, the bulk of the cost of foster care is paid from public funds, State or local, or from funds of voluntary agencies. The lack of financial resources for such care has hindered the development of the most suitable care for children who have to be cared for outside their own home. (S. Rep. No. 165, 87th Cong. 1st Sess. (1961) U.S. Cong. & Adm. News V. 2, 1721)

Congress responded to this situation by amending Title IV to authorize matching funds for one year for needy dependent children who were living in foster homes. During the congressional discussion of the foster care amendment relied on by plaintiffs, it was noted that the courts were frequently hesitating to move children from their natural homes, even though the conditions there were adverse to the children, "if by moving them to a foster home they would lose the aid and would become a welfare charge on the local relief agencies whose programs are financed 100 percent by local or State funds." 107 Cong. Rec. 6387 (1961) (Remarks of Sen. Kerr). Obviously, if a child were removed from its natural home and placed in the home of a relative, federal assistance would still have been forthcoming. By describing a foster home as one which would "lose the aid," Senator Kerr, at least, must have regarded a foster home as an unrelated home.

Further comments on the foster care amendment at that time state that its "sole purpose" was to remove the psychological barrier of "fear of an increase in local cost," so that the courts could consider the welfare of the child "free from any apprehension that by moving it the court would reduce the amount of money that would be available for the child's care." *Id.* It bears repeating that no aid would have been lost or reduced if a child was placed with a relative. However, the full cost of caring for the child would fall upon the states if the child was placed with non-relatives. As plaintiffs note (Pl. Br. p. 24), the foster care program initially pertained only to foster family homes, and not to child-care institutions. Congress quickly remedied this gap in the following year. But, at any rate, it is

clear that the lack of shared funds for foster children was the "sole purpose" for enacting the foster care amendment in the first instance, so that children previously not covered under the federal program could be eligible for federal assistance.

In offering a further amendment to the Social Security Act in 1962, which proposed to bring child-care institutions into the foster-care program and to make the program permanent, Senator McCarthy noted that under the basic ADC program, the federal government was participating in "an extensive program to assist children living in their own homes or in the home of a close relative." 108 Cong. Rec. 12692 (1962) (Remarks of Sen. McCarthy). The further remarks of the Senator show the distinction between these homes and the foster homes covered by the 1961 amendment as follows:

> Last year the Congress adopted a temporary measure to provide Federal participation for a very small percentage of children in foster homes—for those children removed from their homes by court order and placed in a foster family home. This legislation gave the States an alternative to leaving children in unsuitable homes—but where they would be eligible for Federal-aid-to-dependent-children payments—and permitted the States under limited circumstances to place them in foster family homes and *still be eligible for payments*. Both the bill approved by the House and the Finance Committee bill now propose to make this temporary measure a permanent provision. (108 Cong. Rec. 12692 (1962) (emphasis added).

These remarks show that Senator McCarthy as well understood a foster home to be an unrelated home, since aid had been available prior to 1961 for a child placed with a relative. The Senator also read an excerpt of testimony given by the secretary of the welfare committee of the National Association of County Officials before the Committee on Finance, which unmistakably shows that the Association likewise, and the Committee on Finance, regarded foster homes as unrelated homes. This testimony specifically notes that until 1961, "*all* children in foster homes could truly be classified as American forgotten children with respect to federal programs," for the reason that "[c]hildren in foster homes were not eligible for Federal participation under the aid-to-dependent-children program." The reference to "children in foster homes" could not have included related children, who were certainly eligible for federal assistance before 1961.

All of the above comments, along with those previously set forth in the defendants' brief, conclusively show that foster care was not considered to be related care when the foster care program was enacted. Nothing has been subsequently added to the language of the foster care provision to indicate that Congress later abandoned its policy of treating child care by parents and relatives separately from foster care.

D.

The Plain Meaning Of § 408 Indicates That Foster Care Means Non-Related Care.[4]

Section 408(a) when properly read demonstrates Congress' intention to provide assistance to a group of children not previously covered by AFDC—those children living with unrelated caretakers. It also clearly, if implicitly, defines foster care as unrelated care. Section 408 defines the class of "dependent children" eligible for assistance under its provisions as follows:

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4. For clarity, the statutory sections in this portion of the brief will be identified by the numbers used in the Social Security Act.

> (a) the term "dependent child" shall, *notwithstanding section 606(a)* of this title, *also include* a child (1) who would meet the requirements of such section 606(a) . . . *except for his removal . . . from the home of a relative* (specified in such section 606(a)) as a result of a judicial determination to the effect that continuation therein would be contrary to the welfare of such child, . . . (3) *who has been placed in a foster family home . . .* (emphasis added)

The italicized phrase "notwithstanding section 606(a)" states literally that the term "dependent child" shall be defined in § 608 "notwithstanding" or, in spite of, the definition of that term contained in § 606(a). The next italicized phrase "also include" supports this interpretation and the words themselves indicate further that the term "dependent child" is changed in § 608 to include a "dependent child" not previously covered under the definition contained in § 606(a). The only children included in the definition of "dependent child" contained in § 606(a) were those children who lived with specified relatives. It is plain then that under § 608 the definition of "dependent child" was changed to include children who did not live with specified relatives. This construction is further reinforced by Congress' use of the italicized phrase in § 608(a)(1) "except for his [the child's] removal . . . from the home of a relative."[5]

This construction that the new caretaker in the new home must be unrelated to the child is reinforced by examining § 608(a)(3). Section 608(a)(3) reads as follows:

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5. This assumption that the definition of "dependent child" was changed to include care in the home of a non-relative is valid because related care has always been provided for under § 606 whether or not that care was provided subsequent to the removal of the child from his parents' home by court order.

> (a) the term "dependent child" shall, notwithstanding section 606(a) of this title, also include a child . . . (3) *who has been placed in a foster family home.*

Similarly, § 608(b) changes the definition of "aid to families with dependent children" to encompass a class of families not previously eligible for AFDC assistance—families unrelated to the children for whom they care. This term is defined in § 608(b) as follows:

> (b) the term "aid to families with dependent children" shall, *notwithstanding section 606(b)* of this title, *include also foster care in behalf of a child described in paragraph (a) . . .* (emphasis added)

Section 606(b) referred to in § 608 describes aid which may be given "to meet the needs of the *relatives* with whom any dependent child is living . . ." (emphasis added) If § 608(b) defines "aid to families with dependent children" notwithstanding the provisions of § 606(b), it must be interpreted as meaning aid to families unrelated to the dependent child, since § 606(b) means aid to related families. It also stands to reason then that "foster care in behalf of a child described in paragraph (a)" is care rendered by a non-related caretaker because the child described in § 608(a) is one who has been removed from the home of a specified relative who would have been eligible for assistance under § 606(a) except for his removal from that relative's home.

Finally, § 608(f) requires a state to attempt to make the home from which the child was removed suitable for return or to make the home of a relative specified in § 606(a) available for placement so that the child can be removed from foster care. If related care were foster care, there would be no need for such a requirement because the child would be, in fact, living in the home of a relative specified in § 606(a) and the goal of § 608(f) "to otherwise make

possible his being placed in the home of a relative specified in section 606(a)" would be satisfied.

It is respectfully submitted that the plain meaning of the terms employed by Congress in § 608 to define "dependent child" and "aid to families with dependent children" clearly indicates that the children described and the families with which they live are not related to each other. "Foster family home" as employed in § 608(a)(3) must mean a home different than the home described in § 606(a) because a child will be eligible for aid under § 608 "notwithstanding" the fact that he does not live in a home specified in § 606(a). Again, the only homes specified in § 606(a) are relatives' homes. If a child is eligible for aid notwithstanding the fact that he is not living in a relative's home, he must be living in a non-relative's home, and a foster family home must be an unrelated caretaker's home.

II.

THE POSITION TAKEN BY THE DEPARTMENT OF HEALTH, EDUCATION AND WELFARE IN THIS CASE IS CONTRARY TO FEDERAL LAW AND SHOULD NOT BE FOLLOWED.

Plaintiffs state that the interpretation of a statute by an agency is a substantial factor to be considered in construing the statute, even if the agency's interpretation is "not the only reasonable one." (Pl. Br. p. 65) While plaintiffs' statement of the law is correct, it is respectfully submitted that an administrative regulation is not reasonable at all if it conflicts with the specific mandate of Congress. This Court has refused to give administrative rulings *any* weight when they are inconsistent with federal statutes. *Townsend* v. *Swank*, 404 U.S. 282, 30 L. Ed. 2d 448, 453 (1971). The Program Instruction recently adopted by HEW is contrary to the Social Security Act and should not be followed.

As previously discussed in the defendants' brief, HEW's new policy stated in Program Instruction APA-PI-75-9, contravenes the position previously taken by HEW. Plaintiffs seek to construe HEW's 1971 statement as an ill-advised employee's statement; as a "deviant interpretation of national policy by a local official." (Pl. Br. p. 67, fn. 43) Plaintiffs' position amounts to little more than an assertion that HEW does not always mean what it states. Plaintiffs seem to be arguing that the State of Illinois erred by first asking HEW, the agency charged with the duty of administering the Social Security Act, for its position as to the foster care program, and then by taking HEW at its word.

In addition, referring to pages 18-19 of the Solicitor General's brief submitted to this Court, plaintiffs assert that HEW had informed individual states prior to 1974 that otherwise eligible children placed in relatives' homes were eligible for the foster care program. However, pages 18-19 of the Solicitor General's brief make reference to the inconsistent interpretation of § 408 sent to Illinois officials by a regional HEW official. It then simply states that "other states were informed prior to 1974 that foster care by relatives *was* included within the AFDC-FC program, and matching funds were made available to these states." Even if this were true, the State of Illinois was apparently never notified of HEW's changed position after 1971 and prior to 1974, as is evidenced by the letter written by a state official and dated December 22, 1976, which asks HEW to articulate its position on this matter. (See U.S. Br., App. 1a-4a)

Clearly, past HEW policy statements did not include the plaintiff class within the foster care program and, in fact, HEW policy statements specifically contradicted HEW's present Program Instruction. Furthermore, as has

been fully discussed, HEW's revised policy contradicts its own published regulations which indicate that parents and relatives are eligible for AFDC assistance, whereas any other individual and child-care institutions are eligible for AFDC-FC benefits. (See State Br. pp. 34-37) As noted, these official regulations have not been amended since the issuance of the 1974 Program Instruction.

Above all, the recent HEW position taken in its Program Instruction, whether or not that position is consistent with past policy, is erroneous and should not be followed.

CONCLUSION

For the foregoing reasons, Defendants-Appellants respectfully urge this Honorable Court to reverse the judgment of the court of appeals which enjoined the enforcement of the Illinois statutes insofar as they exclude persons related to foster children from eligibility under the foster care welfare program, on the ground that these statutes violate the Social Security Act and the supremacy clause of the United States Constitution.

Respectfully submitted,

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No. 77-742

In the Supreme Court of the United States

OCTOBER TERM, 1977

JEROME MILLER, ET AL., APPELLANTS

v.

MARCEL YOUAKIM, ET AL.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

QUESTION PRESENTED

Whether a state may deny foster care benefits under Section 408 of the Social Security Act, as added, 75 Stat. 76, and amended, 42 U.S.C. 608, to otherwise eligible children who have been placed in the foster care of relatives.

INTEREST OF THE UNITED STATES

This case concerns the availability of foster care aid under Section 408 of the Social Security Act for children who have been removed from their homes by a court order and placed, with the approval of the

appropriate state agency, in the care of a relative of the children. The Secretary of Health, Education, and Welfare, who administers the Social Security Act, has concluded that, under the statute, foster care benefits must be paid when foster care is provided by relatives (A. 48-50). The Illinois statute and policies challenged here, however, refuse payment of foster care benefits in this situation. Ill. Ann. Stat. ch. 23, §§ 2212.05, 2212.17 (1977 Cum. Supp.).

This litigation has been before the Court once before. *Youakim* v. *Miller*, 425 U.S. 231. At that time, the United States filed a memorandum as *amicus curiae* in response to the Court's invitation (see A. 51-56). The Court's decision necessarily will affect the duties of the Secretary, and the United States therefore has a continuing interest in the case. We file this brief to supplement our previous memorandum.

STATEMENT

Illinois participates in the federally subsidized program for aid to families with dependent children (AFDC) established in Title IV of the Social Security Act, 49 Stat. 627, as amended, 42 U.S.C. 601 *et seq.* The basic AFDC program (Section 406 of the Act, 42 U.S.C. (and Supp. V) 606) provides aid to families of qualified dependent children who are living with their parents or with certain specified relatives. Under Section 408, which was added to the Act in 1961, the AFDC program also provides foster care aid (AFDC-FC) for dependent children who have

been removed from their homes by court order and placed in a foster family home or child care institution. In implementing these federal aid programs, Illinois grants foster care aid when the foster care is provided in an institution or in the home of a person who is not related to the dependent child. Ill. Ann. Stat. ch. 23, §§ 2212.05, 2212.17 (1977 Cum. Supp.). When the foster child is cared for in the home of a reative, however, the State provides assistance only under the basic AFDC program.[1]

Appellees are foster parents caring for children related to them, and the children themselves. They brought the suit as a class action, contending that the Illinois statute, and implementing policies, violate the Equal Protection Clause. A three-judge court rejected these contentions and dismissed the suit (374 F. Supp. 1204; J.S. App. E). After the district court had made its decision, the Department of Health, Education, and Welfare (HEW) issued Program Instruction APA-PI-75-9 (A. 48-50), which provides that

> [w]hen a child has been removed from his home by judicial determination and is place in foster care under the various conditions specified [in Section 408 of the Act], the foster care rate

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[1] AFDC-FC payments in Illinois are $105 per child per month, without respect to individualized determinations of need (Miller Br. 14). The state's basic AFDC payments are $63 per child per month but may be supplemented to a total of $105 per month on a showing of need by relatives who are caring for dependent children (*ibid.*).

> of payment prevails regardless of whether or not the foster [care] home is operated by a relative.

In light of this administrative interpretation, this Court vacated the judgment of the district court and remanded for further consideration of the contention, raised on appeal, that the Illinois practice violates federal law. 425 U.S. 231.

On remand the district court held that the challenged Illinois statute, and the implementing policies and procedures of the Illinois Department of Children and Family Services, are contrary to the Social Security Act, federal regulations, and Program Instruction APA-PI-75-9, and are therefore invalid under the Supremacy Clause of the Constitution (431 F. Supp. 40; J.S. App. B21-B31). The court pointed out that, under the plain terms of the federal statute, children in "foster" homes are eligible for AFDC-FC benefits, and that appellees' home had been approved by Illinois as a foster home (J.S. App. B28). The court also relied on the HEW Program Instruction as "persuasive authority" (*id.* at B29) and concluded that the legislative history of the statute supports the position taken by the agency (*id.* at B30-B31).

The court of appeals affirmed (562 F.2d 483; J.S. App. B1-B20). The court adopted the opinion of the district court (J.S. App. B5) and added several further observations. It pointed out that payments under AFDC-FC would be available at least if a state approves a particular home as a foster family home, and it concluded that Illinois had so approved appellees' home in all but name (*id.* at B8-B13). The court also observed that appellants' reading of other portions of the federal statute exalted form over substance (*id.* at B13-B16).

SUMMARY OF ARGUMENT

A state that has elected to participate in the AFDC program must provide foster care aid to all eligible persons. 42 U.S.C. (and Supp. V) 602(a)(10), (20). Under Section 408 of the Social Security Act, foster care aid is to be provided to a dependent child who has been removed from his home by a judicial order and placed by the state in the "foster family home of any individual * * *." 42 U.S.C. 608(a), (b)(1). Because foster care provided by relatives, as well as by non-relatives, falls within the scope of the federal definition of eligibility, relatives providing foster care are entitled to foster care aid under Section 408.

Appellants concede that foster care provided by relatives is within the literal scope of the eligibility criteria in Section 408. They argue, however, that the legislative history of the federal foster care program indicates that relatives providing foster care are eligible for assistance only under the basic AFDC program in Section 406, and are not eligible for foster care aid under Section 408. But the legislative history of Section 408 supports the conclusion that foster care by relatives is included within the federal foster care program. The objectives of Section 408 are to provide the most suitable possible care for foster children and to establish a remedial environment to

correct the history of neglect endured by foster children prior to their removal from their parents' home by judicial order. Foster care provided by relatives contributes significantly toward achieving these objectives, and it would therefore be anomalous to conclude that Congress intended to exclude foster care by relatives from the federal foster care program. Moreover, a relative who provides foster care incurs obligations identical to those assumed by other foster parents under state law. Relatives and non-relatives providing foster care thus have equal need for the higher foster care payments that Congress has established in recognition of the higher costs associated with state-supervised foster care.

The Secretary of Health, Education, and Welfare has adopted an interpretive rule under Section 408 that confirms that foster care provided by relatives is included within the scope of the federal foster care program. The agency's rule provides that, if other eligibility standards are met, foster care eligibility will exist "regardless of whether the * * * foster family home in which a child is placed is operated by a relative * * *" (A. 49). This is the agency's only official national interpretation concerning the coverage of relatives providing foster care under Section 408, and the rule has been consistently applied by the agency since it was promulgated in 1974. In view of the substantial support in the language and history of the Act for the agency's determination that foster care provided by relatives is within the scope of Section 408, the agency's interpretation is entitled

to significant deference and should be upheld in this case.

ARGUMENT

Foster Care Benefits Are Not Limited To Children In The Care Of Unrelated Persons

1. Once a federal standard of eligibility has been defined under the Social Security Act, "a participating State may not deny aid to persons who come within it in the absence of a clear indication that Congress meant the coverage to be optional." *Burns* v. *Alcala*, 420 U.S. 575, 580. See *Carleson* v. *Remillard*, 406 U.S. 598; *Townsend* v. *Swank*, 404 U.S. 282; *King* v. *Smith*, 392 U.S. 309. Congress has made it clear that, once a state has elected to participate in the basic AFDC program, state participation in the AFDC-FC program is mandatory and the state must provide foster care aid to all eligible persons. Section 402(a)(20) of the Act, 42 U.S.C. (and Supp. V) 602(a)(20), provides that

> [a] State plan for aid and services to needy families with children must * * * (20) effective July 1, 1969, provide for aid to families with dependent children in the form of foster care in accordance with section 408 of [the Act] * * *.

Section 402(a)(10), 42 U.S.C. (and Supp. V) 602(a)(10), states further that the state plan must provide aid "to all eligible individuals." Accordingly, if foster care provided by relatives is "foster care in accordance with section 408 of [the Act]," the states may not deny AFDC-FC assistance when an eligible child is placed in the foster care of a relative.

2. Section 408 sets forth several criteria for determining eligibility for foster care assistance.[2] The three essential requirements are:

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[2] Section 408(a) of the Social Security Act, as added and amended, 42 U.S.C. 608(a), provides:

> Effective for the period beginning May 1, 1961—
>
> (a) the term "dependent child" shall, notwithstanding section 606(a) of this title, also include a child (1) who would meet the requirements of such section 606(a) or of section 607 of this title except for his removal after April 30, 1961, from the home of a relative (specified in such section 606(a)) as a result of a judicial determination to the effect that continuation therein would be contrary to the welfare of such child, (2) whose placement and care are the responsibility of (A) the State or local agency administering the State plan approved under section 602 of this title, or (B) any other public agency with whom the State agency administering or supervising the administration of such State plan has made an agreement which is still in effect and which includes provision for assuring development of a plan, satisfactory to such State agency, for such child as provided in paragraph (f)(1) and such other provisions as may be necessary to assure accomplishment of the objectives of the State plan approved under section 602 of this title, (3) who has been placed in a foster family home or child-care institution as a result of such determination, and (4) who (A) received aid under such State plan in or for the month in which court proceedings leading to such determination were initiated, or (B)(i) would have received such aid in or for such month if application had been made therefor, or (ii) in the case of a child who had been living with a relative specified in section 606(a) of this title within 6 months prior to the month in which such proceedings were initiated, would have received such aid in or for such month if in such month he had been living with (and removed from the home of) such a relative and application had been made therefore.

> (i) the child was previously eligible for AFDC aid and living in the home of a parent or relative (as that term is defined in Section 406 (a))[3], but has been removed from that home as "a result of a judicial determination to the effect that continuation therein would be contrary to the welfare of [the] child;"
>
> (ii) the placement and care of the child are the responsibility of the State or an agency designated by the State; and
>
> (iii) the child has been placed in a foster family home or child-care institution.

Every court that has considered the issue has concluded that dependent children who have been removed from their homes by judicial order and placed by the state in the homes of relatives satisfy the cri-

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[3] Section 406(a) of the Act, 42 U.S.C. 606(a) provides:

> When used in this part—
>
> (a) The term "dependent child" means a needy child (1) who has been deprived of parental support or care by reason of the death, continued absence from the home, or physical or mental incapacity of a parent, and who is living with his father, mother, grandfather, grandmother, brother, sister, stepfather, stepmother, stepbrother, stepsister, uncle, aunt, first cousin, nephew, or niece, in a place of residence maintained by one or more of such relatives as his or their own home, and (2) who is (A) under the age of eighteen, or (B) under the age of twenty-one and (as determined by the State in accordance with standards prescribed by the Secretary) a student regularly attending a school, college, or university, or regularly attending a course of vocational or technical training designed to fit him for gainful employment.

teria for eligibility under Section 408 and are therefore entitled to foster care assistance.[4]

Appellants concede that foster care by relatives as well as by non-relatives is within the literal scope of the eligibility criteria in Section 408 (J.S. 11; J.S. App. B7). They argue, however, that despite the evident breadth of Section 408, Congress did not intend that foster care provided by relatives would be included in the AFDC-FC program. Appellants contend (a) that the history of the 1961 legislation creating the AFDC-FC program indicates that coverage is cleanly bifurcated—that care by relatives is covered under the basic AFDC program in Section 406, while foster care by non-relatives is covered under Section 408; (b) that the statutory phrasing of certain portions of Section 408 would be anomalous if foster care by relatives were included in the AFDC-FC program; and (c) that, in any event, Congress left it to the states to determine licensing and approval standards for "foster family homes," and Illinois has adopted standards under which relatives

[4] In addition to the instant case, see *Jones* v. *Davis*, D. Ore., Civil No. 76-805, decided January 31, 1977, appeal docketed, C.A. 9, No. 77-2254; *Clampett* v. *Madigan*, S.D. S.D., decided May 24, 1973, [1972-1974 T.B.] CCH Pov. L. Rep. ¶ 17,979; *Jackson* v. *Ohio Department of Public Welfare*, N.D. Ohio, Civil No. C72-182, decided April 17, 1972; *Alston* v. *Department of Health and Social Services*, Cir. Ct. Wisc., decided January 21, 1976, [1974-1976 T.B.] CCH Pov. L. Rep. ¶ 22,336; *Thompson* v. *Department of Health and Social Services*, Cir. Ct. Wisc., decided January 9, 1976, [1974-1976 T.B.] CCH Pov. L. Rep. ¶ 22,303; *Taylor* v. *Dumpson*, Sup. Ct. N.Y., decided October 17, 1974, [1974-1976 T.B.] CCH Pov. L. Rep. ¶ 20,244.

cannot provide foster care. None of these contentions is persuasive.

a. The basic AFDC program in Section 406 of the Act provides eligibility only for needy children who are living with their parents or with certain specified relatives. Prior to the enactment of Section 408, a needy child removed from the home of his parent or relative and placed in the home of a non-related person thus lost his eligibility for aid under the AFDC program. Appellants are therefore correct in observing (Br. 20) that, in enacting Section 408, Congress was principally concerned to assure that a foster child would continue to be eligible for federal assistance after the child had been removed from his home by judicial order. See S. Rep. No. 165, 87th Cong., 1st Sess. 6 (1961).

But this was not the single objective of the legislation. The underlying purpose of the foster care program is to assure that proper "remedial action" is taken when a child is removed from his home by judicial order, and that the child is placed in the most suitable possible care. S. Rep. No. 165, *supra*, at 6; 107 Cong. Rec. 6388 (1961) (Senator Byrd). There is no suggestion in the legislative history that Congress meant to enforce a neat bifurcation in the AFDC program so that relatives would not be proper foster parents under Section 408. Indeed, it would have been anomalous for Congress to have enacted Section 408 to provide the most suitable possible care for foster children, but then to exclude foster care by relatives from the coverage of that program. In-

stead, the language of Section 408 supports the conclusion that foster care by relatives is included within the AFDC-FC program by stating that foster care may be provided "in the foster family home of any individual * * *." Section 408(b)(1), 42 U.S.C. 608 (b)(1).

When Section 408 was first enacted, federal matching payments under the basic AFDC program in Section 406 were identical to those under the AFDC-FC program in Section 408. S. Rep. No. 165, *supra*, at 6. Accordingly, it was not a matter of concern at that time whether foster care provided by relatives was included within the AFDC-FC program or only within the basic AFDC provision.[5] The scope of AFDC-FC coverage became significant in this regard only in 1967, when Congress amended the Act to provide more favorable federal matching payments to the states for assistance to foster families. See Section 403(a)(1)(B) of the Social Security Act, as amended, 42 U.S.C. 603(a)(1)(B); S. Rep. No. 744, 90th Cong., 1st Sess. 286 (1967). Congress determined in 1967 that federal matching payments for foster care should be increased because foster care is relatively "more costly" than unsupervised care in the child's own home. S. Rep. No. 744, *supra*, at 164.

The history of the 1967 amendment reinforces the conclusion that Congress did not differentiate between

[5] By regulation, HEW had provided for AFDC eligibility for a relative caring for a child held in the legal custody of a state agency. 45 C.F.R. 233.90(c)(1)(v)(B). This regulation encompassed the situation where the state had placed the child with the relative under a foster family agreement.

foster care by relatives and non-relatives in enacting Section 408. The reasoning adopted by Congress in increasing foster care assistance applies equally to foster care provided by relatives and by non-relatives, because relatives and non-relatives alike are subject to extra costs resulting from the acceptance of foster care responsibilities. For example, under the "Relative Home Placement Agreement" between Illinois and the appellees in this case (A. 20-23), appellees have accepted obligations to conform to the state foster care requirements for medical and dental health, general care and clothing, and religious training of the foster children. Moreover, foster parents—whether relatives or non-relatives of the children—accept a continual supervisory role by the state as a condition of the placement of the foster children (*ibid.*). As the district court found in this case, a relative providing foster care incurs "identical obligations as all other foster parents" in the state (J.S. App. B28).[6]

[6] Appellants argue that certain language in the 1967 Senate Report indicates that Congress intended foster care by relatives to be outside the scope of the AFDC-FC program (Br. 23-24). There is additional language that appellants overlook, however, that materially modifies the conclusion appellants would draw.

The Committee stated first that persons providing foster care for children removed from their homes by judicial order would be entitled to receive the higher AFDC-FC aid payments under the amended Act. S. Rep. No. 744, *supra*, at 163-164. The Committee then noted that Section 406 would also allow relatives who "are not legally responsible for support" to receive basic AFDC benefits when they care for children

Furthermore, the additional AFDC-FC resources made available under the 1967 legislation contribute importantly to the remedial objective of the federal foster care program—an objective that applies with equal force whether the foster care is provided by relatives or non-relatives. When a child is removed from his home as the result of a judicial determination that the child has been abused or neglected, it is important that the child's new environment be one that can heal and correct the scars of the past. See S. Rep. No. 165, *supra*, at 6. The need for additional AFDC-FC resources to provide a remedial environment for a foster child is related to the child's status as the subject of substantial prior neglect, and is not related to the foster parent's status as a relative or non-relative of the child.

b. Appellants maintain (Br. 22-23, 29) that Section 408(f)(1) demonstrates that Congress did not intend to define care by relatives as eligible foster care. This Section provides that the state foster care plan must ensure that each child is receiving proper care and that

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"who have no parents or who are not able to live with their parents." *Id.* at 164. Read in its context, this explanation falls far short of an assertion that a relative who assumes legal responsibilities as a foster parent under state law, and who cares for a child who has been removed from his home by a judicial order, is not entitled to the higher assistance payments provided by the foster care program. Indeed, as is discussed in the text, the express congressional objective in enacting higher assistance rates for the AFDC-FC program supports the inclusion of foster care by relatives within Section 408.

> services are provided which are designed to improve the conditions in the home from which he was removed or to otherwise make possible his being placed in the home of a relative specified in section 406(a) of this title.

The Section expresses a preference for the return of children to their own homes or the transfer of their care to the home of a relative. Appellants argue that Congress could not have intended to make relatives eligible for foster care aid under Section 408 if the states are required by that Section to seek transfer of the child to his own home or to the home of a relative.

As the court of appeals correctly held (J.S. App. B13-B16), however, there is no anomaly in this provision. Section 408(f)(1) requires only that, after placing a child in a foster family home, the state must provide services toward the eventual transfer of the child to the home of his parents or relatives. If the child is initially placed in the foster care of a relative, the state may still satisfy this requirement by providing appropriate services that help achieve the ultimate objective of returning the child to his parent's home. Section 408(f)(1) is thus consistent with the conclusion that foster care by relatives is within the scope of the AFDC-FC program.

Appellants' argument based on Section 408(f)(1) simply *assumes* that the transfer of a child to the home of a relative terminates coverage under AFDC-FC. That begs the question presented by this case. For the reasons discussed at pages 11-14, *supra*, it

seems most likely that Section 408(f)(1) expresses a congressional preference for foster care by relatives over foster care by strangers. Nothing in the idea of such a preference indicates that care by relatives is outside the scope of AFDC-FC.[7]

c. Congress defined the term "foster family home" in Section 408 to mean

> a foster family home for children which is licensed by the State in which it is situated or has been approved, by the agency of such State responsible for licensing homes of this type, as meeting the standards established for such licensing * * *.

Appellants contend (J.S. 16-17) that this provision permits a state to apply its licensing and approval criteria for "foster family homes" in a way that excludes foster care by relatives.

The definition of "foster family homes" in Section 408 requires only that the home be "licensed" by the state or "approved" by the state as meeting the standards for licensing. The district court properly found

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[7] Coverage under AFDC-FC would cease, however, if the transfer were to the child's parents, or if the transfer were accompanied by a dissolution of the court's supervision of the child. But these circumstances would amount to the discontinuation of one of the explicit criteria of eligibility under Section 408(a). States that carry out their duties under Section 408(f)(1) thus often will terminate AFDC-FC coverage, but that termination occurs only insofar as the movement of children under Section 408(f)(1) affects the criteria of Section 408(a). This gives substantial importance to the rule of Section 408(f)(1) while at the same time honoring the explicit eligibility rules.

that Illinois has "approved" appellees' home as a "foster family home" by entering into a placement agreement with appellees that states (A. 21; J.S. App. B28; see *id.* at B11):

> [t]he Division of Child Welfare, Department of Children and Family Services, has approved the home of Mr. and Mrs. Marcel Youakim, address 1720 Mannheim Rd., Des Plaines, Ill., for the care of a foster child * * *.

Because Illinois has approved the appellees' home under the state's foster care standards, this case does not present the question whether the state could apply its licensing standards to deny foster care approval (and AFDC-FC eligibility) to all relatives with whom foster children are placed. We observe, however, that a participating state may not erect narrow classifications that have the design or effect of denying AFDC-FC aid to persons that Congress has made eligible (*Carleson* v. *Remillard*, *supra*, 406 U.S. at 601, 604; *Townsend* v. *Swank*, *supra*, 404 U.S. at 285); it is therefore doubtful that a state could deny coverage simply by refusing to apply the label "foster" to care that otherwise meets its standards for care by persons other than the child's parents.

3. HEW Program Instruction APA-PI-75-9 confirms that foster care by relatives is included within the scope of Section 408. The instruction provides that when a dependent child is removed from his home by a judicial order and placed in a foster home by a state agency, AFDC-FC eligibility will exist "regardless of whether the * * * foster family home in

which a child is placed is operated by a relative * * *" (A. 49). This Court already has held that the Program Instruction, as an "interpretation of a statute by an agency charged with its enforcement[,] is a substantial factor to be considered in construing the statute" (425 U.S. at 235).

Appellants assert that this Program Instruction conflicts with other HEW pronouncements and is therefore entitled to little weight (Br. 32-37). Appellants rely heavily on the fact that an inconsistent interpretation of Section 408 had been issued prior to the 1974 instruction in a letter sent to Illinois officials by a regional HEW official (Br. 32-37, S26-S28).[8] This letter was not, however, approved by HEW's General Counsel or by any departmental official in the national office.[9] Moreover, other states

[8] Appellants also assert that 45 C.F.R. 233.90(c) (1) (v) (B) is inconsistent with the 1974 Program Instruction because the regulation provides for basic AFDC eligibility for a family that cares for a related child who is in the legal custody of a state agency (Br. 33-35). As we discuss in note 5, *supra*, this regulation would provide AFDC coverage for families providing foster care for related children. But AFDC eligibility in this situation is not inconsistent with the conclusion in the 1974 Program Instruction that foster care by relatives is included under the AFDC-FC program. AFDC-FC eligibility may, in these circumstances, overlap with basic AFDC eligibility, and the foster family is entitled to elect the higher level of assistance. See 45 C.F.R. 206.10(a) (1) (i) (each eligible person "may apply under whichever of the State plans he chooses").

[9] See the letter from the office of HEW's General Counsel that we have attached as an appendix to this brief. *General Electric Co.* v. *Gilbert*, 429 U.S. 125, on which appellants rely

were informed prior to 1974 that foster care by relatives *was* included within the AFDC-FC program, and matching foster care payments were made available to these states. The 1974 Program Instruction was thus issued "to resolve the problem of some States not licensing or approving the homes of non-legally liable relatives as foster care homes [under the AFDC-FC program]" (A. 48). The agency's 1974 Program Instruction is its first and only official national interpretation concerning the coverage of foster care by relatives under Section 408, and it has been consistently applied since its promulgation.

Recognition of HEW's significant role as the agency charged by Congress with the responsibility for implementing the Social Security Act supports the proposition that the agency's determination concerning the scope and objectives of the AFDC-FC program "should be followed unless there are compelling indications that it is wrong * * *." *New York Department of Social Services* v. *Dublino*, 413 U.S. 405, 421, quoting *Red Lion Broadcasting Co.* v. *Federal Communications Commission*, 395 U.S. 367, 381. See also *Dandridge* v. *Williams*, 397 U.S. 471, 481-482. Measured against this standard, which applies at least when the agency's position is fully explained and there is substantial support for the agency's interpretation,[10] the agency's determination that foster

(Br. 33) is therefore inapposite, because the "earlier pronouncement" involved in that case had been an official opinion letter by the agency's General Counsel. 429 U.S. at 142-143.

[10] See *Securities and Exchange Commission* v. *Sloan*, No. 76-1607, decided May 15, 1978, slip op. 13-15.

care by relatives is included within the AFDC-FC program is reasonable and should be upheld by this Court.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.

KENT L. JONES,
Assistant to the Solicitor General.

JUNE 1978.

APPENDIX

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE

December 22, 1976

Richard L. Ryan
Special Assistant Attorney General
Office of the Attorney General
State of Illinois
160 North La Salle Street
Chicago, Illinois 60601

Re: *Youakim* v. *Miller*

Dear Mr. Ryan:

Mr. Barnard Genis wrote to Secretary Mathews on August 25. That letter raised several questions regarding the substance of a Departmental interpretation of Section 408(a) of the Social Security Act (AFDC-FC) which was articulated in program instruction APA-PI-75-9, issued on October 25, 1974. Mr. Genis requested that we communicate any response to you. On October 18, Robert Jaye of this Office wrote to Mr. Genis explaining the delay in responding to his letter, and informing him that a response would be forthcoming shortly. This letter constitutes that response.

The program instruction referred to by Mr. Genis provides that "[w]hen a child has been removed from his home by a judicial determination and is placed in foster care under the various conditions specified

in Section 408 of the Social Security Act and 45 CFR 233.110, the foster care rate of payment prevails regardless of whether or not the foster home is operated by a relative." Mr. Genis indicated in his letter that the United States District Court for the Northern District of Illinois relied upon this instruction when it invalidated an Illinois policy of paying otherwise eligible foster children who were residing in foster care with relatives at the regular AFDC rate.

Specifically, Mr. Genis asked if this program instruction truly reflects the Department's position on the payment of AFDC-FC benefits to foster children residing with relatives. The answer, of course, is that it does.

Mr. Genis also asked whether the requirements contained in a program instruction are mandatory, and if so, why they are not issued in the form of regulations or guidelines.

The Administrative Procedure Act provides that:

> "*Except to the extent that a person has actual and timely notice* of the terms [of substantive rules or statements of general policy or *interpretations of general applicability* formulated and adopted by the agency], a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published." 5 USC 532(a)(1). (Emphasis supplied.)

The underscored language clearly implies that any interpretation of general applicability of which an

individual has actual knowledge will be binding upon that person, irrespective of publication in the Federal Register.

Program instructions fall under the ambit of this provision since they constitute the Department's interpretation of the Social Security Act or implementing regulations. These interpretations were forwarded to all States upon issuance. Accordingly, while they are in effect, they are binding upon all States. Program instructions also bind the Department to administer the Act and implementing regulations in a manner consistent with those interpretations. Thus, to use the example of the program instruction cited in Mr. Genis' letter, Illinois would be out of compliance with the Act and regulations as interpreted by the Department, if the State were to pay the regular AFDC rate on behalf of children who met all the eligibility conditions of Section 408, and who were placed with relatives.

With regard to why these instructions are not issued in the form of regulations, the Administrative Procedure Act at 5 USC 553, contains general requirements for publication of proposed rulemaking, an opportunity for comment thereon, and publication of the basis and purpose for the adoption of *substantive* rules except when otherwise specified by statute. However, clause (b)(A) of that provision *exempts* "*interpretative rules*" from those requirements. Since program instructions are interpretations of the Act or regulations as opposed to substantive rules, they

are exempt from these requirements, and need not be promulgated through formal rulemaking procedures.

Finally, Mr. Genis attached a March 10, 1971, letter from the Acting Regional Commissioner, SRS, to an official of the Illinois Department of Public Aid which articulated a position on this matter at variance with the interpretation espoused in the program instruction. That letter indicated that the Department did not require States to make payments at the AFDC-FC rate to otherwise eligible children in foster care who were residing with relatives. Mr. Genis questioned why the Department reversed the Federal government's previous position when it issued the program instruction. Our research does not divulge the existence of any policy issued by the Central Office of HEW on the matter at the time the Regional Office letter was written. That letter, therefore, only constituted the views of the Regional Commissioner on the proper interpretation of the statute. Accordingly, the program instruction did not reverse the Federal government's position on the matter, but rather, for the first time stated a national interpretation.

I hope this letter answers the questions raised by Mr. Genis.

Sincerely yours,

Galen D. Powers
Assistant General Counsel

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-742

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v.

MARCEL YOUAKIM, ET AL., *Appellees.*

On Appeal From the United States Court of Appeals for the Seventh Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE AND BRIEF AMICI CURIAE

For:

AMERICAN ORTHOPSYCHIATRIC ASSOCIATION
AMERICAN PSYCHIATRIC ASSOCIATION
CHILD ADVOCACY CENTER
CHILD WELFARE LEAGUE OF AMERICA, INC.
CHILDREN'S DEFENSE FUND OF THE WASHINGTON RESEARCH PROJECT, INC.
FAMILY SERVICE ASSOCIATION OF AMERICA
NATIONAL ASSOCIATION OF SOCIAL WORKERS
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NATIONAL CONFERENCE OF CATHOLIC CHARITIES
NATIONAL URBAN LEAGUE, INC.

The organizations listed above respectfully move, pursuant to Rule 42(3) of the Rules of this Court, for leave to file the attached brief amici curiae in the above-entitled case. Appellees have consented to the filing. Consent has been denied by the appellants.

INTEREST OF AMICI

The American Orthopsychiatric Association, founded in 1924, is an interdisciplinary organization of 4,000 members, including psychiatrists, psychologists, social workers, educators and allied professionals concerned with the problems, causes and treatment of abnormal behavior. Many of the Association's members are regularly involved in the treatment of children who are the products of broken homes. These children have a desperate need for substitute parental relationships that often can best be provided by the children's relatives.

The American Psychiatric Association, founded in 1844, is the nation's largest organization of qualified doctors of medicine who specialize in psychiatry. Almost 24,000 of the nation's approximately 30,000 psychiatrists are members of the Association. It has participated as an amicus curiae numerous times in cases throughout the country involving mental health issues. The Association believes that resolution of the issues presented in the instant case will have an important impact on the psychological well-being of needy children.

The Child Advocacy Center is a local advocacy project committed to improving the child welfare system in Washington, D. C. The Center has conducted a detailed study of the District of Columbia's system for providing services to abused and neglected children and their families, and was instrumental in passage of recent revisions in child abuse legislation in the District directed at ensuring more appropriate services to this population. It has also been involved in litigation challenging the inappropriate institutionalization of children.

The Child Welfare League of America, Inc. is a national voluntary standard setting organization with over 400 local affiliates, many of which are engaged in placing needy children in foster care and in providing services to the children and their families. The League is strongly opposed to any discrimination against relatives in the out-of-home placement of needy children.

The Children's Defense Fund of the Washington Research Project, Inc. (CDF) is a nonprofit public interest organization which gathers evidence about and attempts to remedy, through monitoring, litigation and other means, the needs of children in the United States. CDF has recently completed a two year study of children living outside of their homes in institutions and other foster placements. The study, which will be published in the Fall of 1978, included a detailed review of placement policies and practices in seven states as well as a survey of child welfare offices in 140 counties throughout the country. From its experience, CDF concluded that placements with willing relatives should be given preference over placements with strangers or in institutions. CDF believes that the denial of benefits under the AFDC-FC program to children living with relatives is one of the major impediments to securing appropriate out-of-home care for needy, neglected children.

The Family Service Association of America is a membership federation of approximately 285 community supported and community serving family agencies, each of which exists to aid families and individuals with personal or social needs and to advocate for the needs of families under stress. The Association is concerned that the exclusion of relative placements from the AFDC-FC program will severely hamper efforts

of some of its member agencies to secure the best possible care for needy children.

The National Association of Social Workers (NASW) is the largest professional association of social workers in the world, comprised of 80,000 social workers with chapters in all fifty states and the District of Columbia. It is devoted to the advancement of sound public policy for social work consumers as well as professionals. NASW has been particularly involved in recent years in working to combat child abuse and neglect through training directed toward administrators and direct service workers. As staff in public and private child welfare agencies, many of NASW's members are involved in mitigating the effects of family disruption and, where necessary, placing needy children in out-of-home care. NASW believes that the exclusion of relative placements from the AFDC-FC program impedes the possibility for continuity and stability in substitute care which is so crucial to the well-being of these children.

The National Conference of Catholic Charities is an association of several hundred Catholic charitable and human service agencies located in 142 of the 153 dioceses in the United States. The Conference and its member agencies have long been involved in family and child services, including the provision and administration of foster care placements. The Conference is particularly concerned that the denial of AFDC-FC assistance to children living with relatives threatens family unity and makes it more difficult to maintain the religious and cultural identity of needy children.

The National Urban League, Inc. has affiliates in 112 cities, devoted to assisting urban communities with

minority group problems that develop out of poverty, discrimination and neglect. The League has recently sponsored an extensive study of informal fostering arrangements in black families that documents the importance of extended family relationships for the development of black children. Hill, Informal Adoption Among Black Families (1977). The League firmly believes that the continued vitality of extended families is seriously threatened by the discrimination against relative placements that is challenged in this case.

Amici share a deep conviction that the family must be preserved as the fundamental social unit in our society. In cases where children must be removed from their homes, *Amici* believes that every reasonable effort should be made to make it possible for the child to be returned to his or her natural parents. Where return to the parents is not possible, we believe that each child is entitled to a permanent home.

For many neglected children, placements with relatives may offer the best opportunity for family continuity as well as for the development of healthy, caring substitute relationships. The policies challenged in this case, however, make it difficult, if not impossible, for child placement authorities in some states to place children with their relatives, even where that would be in the children's best interests. *Amici* submit the attached brief in order to make the Court aware of the important consequences of the case for children in this country, as well as to insure that the Court is fully

aware of the background and history of the AFDC-FC program as a program intended to make the best possible care available for needy neglected children.

Respectfully submitted,

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Dated: July 17, 1978

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BRIEF AMICI CURIAE

For:

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FAMILY SERVICE ASSOCIATION OF AMERICA
NATIONAL ASSOCIATION OF SOCIAL WORKERS
NATIONAL CONFERENCE OF CATHOLIC CHARITIES
NATIONAL URBAN LEAGUE, INC.

INTEREST OF AMICI

The Interest of Amici is set out, *supra,* in the Motion for Leave to File this brief.

QUESTION PRESENTED

Whether a state may deny foster care benefits under Section 408 of the Social Security Act, 42 U.S.C. § 608, to otherwise eligible children who have been placed in state-approved foster homes of their relatives by a juvenile court or other child placement agency.

STATEMENT

The AFDC-foster care program (hereafter AFDC-FC) was enacted in 1961 to help finance out-of-home care for needy, neglected children. The program provides federal financial assistance to the states for the care and support of children who have been removed by court order from the homes of their parents or other caretaker relatives because conditions in the homes were not conducive to the children's welfare. 42 U.S.C. § 608(a)(1). The program is limited to children who prior to their removal had been receiving or who were eligible for public assistance under the Aid to Families of Dependent Children program (hereafter AFDC). 42 U.S.C. § 608(a)(4).

The question in this case is whether states may exclude from the AFDC-FC program neglected children who are placed by a court or child placement agency in the homes of their relatives, merely because, unlike children who are placed with strangers, the children would continue to qualify for assistance under the basic AFDC program. Only a small number of states exclude relative placements from their AFDC-FC programs.[1] The remaining states allow foster payments

[1] According to the government's Brief Amicus Curiae in support of the petition for certiorari when this case was previously before this Court, fourteen states, including Illinois, exclude children living with relatives from the AFDC-FC program. Appendix 56.

for children placed with relatives, although a decision in favor of the state in this case could jeopardize federal payments to those states. *See, Burns* v. *Alcala,* 420 U.S. 575, 586 (1975).

In enacting the AFDC-FC program, Congress relied upon the child protection laws of each state to determine which children are in need of foster care support. Under these laws, children may be removed from the homes of their parents or other legal guardians upon a finding by a court that conditions in the home are not conducive to the children's welfare.[2] *See generally,* Katz, Howe & McGrath, *Child Neglect Laws in America,* 9 Family L.Q. 1 (1975). Removal of a child through neglect[3] proceedings does not ordinarily terminate the parents' legal rights regarding the child, but rather is regarded as a temporary step to protect the child from immediate harm. Wald, *State Intervention on Behalf of "Neglected" Children: Standards for Removal of Children From Their Homes, Monitoring the Status of Children in Foster Care, and Termination of Parental Rights,* 28 Stan. L. Rev. 623, 633-634 (1976);[4] Areen, *supra* at 928-30.

Where a child must be removed from the home of a parent or guardian, state laws give considerable dis-

[2] Standards for removal range from physical abuse or neglect to the absence of "proper parental care" or "proper attention." Areen, *Intervention Between Parent and Child: A Reappraisal of the State's Role in Child Neglect and Abuse Cases,* 63 Geo. L.J. 887, 920-928 (1975); Mnookin, *Foster Care—In Whose Best Interest?,* 43 Harv. Ed. Rev. 599, 604 (1973).

[3] For convenience, *Amici* refer to all judicial proceedings leading to removal of a child from the home for dependency, neglect or abuse as "neglect" proceedings.

[4] Wald states that termination of parental rights at the initial neglect hearing is rare in most cases. Wald, *supra* at 634.

cretion to the juvenile court or a child welfare agency to select the placement that is best suited to the child's individual needs and family situation.[5] In recognition of the important role of extended families in our society, however, many state laws specifically mention relatives' homes as a placement option for neglected children.[6] Moreover, even where relatives' homes are

[5] In this case, the Illinois Juvenile Court Act provides that juvenile courts should secure for the child "custody, care and discipline as nearly as possible equivalent to that which should be given by his parents." Ill. Rev. Stat. ch. 37, § 701-2(1) (Appendix 32-33). The language of other state laws is generally as broad. *See, e.g.*, Ala. Code tit. 13, § 361 (court may make any order which is "for the best interest of the child"); Ga. Code Ann. § 24A-2301 (court shall make the "disposition best suited to the protection and physical, mental and moral welfare of the child"); Md. Cts. & Jud. Proc. Code Ann. § 3-820 ("The overriding consideration in making a disposition is a program of treatment, training and rehabilitation best suited to the physical, mental and moral welfare of the child consistent with the public interest"); N.C. Gen. Stat. § 7a-286 (court shall "select the disposition which provides for the protection, treatment, rehabilitation, or correction of the child"); N.D. Cent. Code § 27-20-30 (court may take "any action best suited to the protection and physical, mental and moral welfare of the child"); Pa. Stat. Ann. tit. 11, § 50-321 (court shall make the "disposition best suited to the protection and physical, mental and moral welfare of the child").

[6] *Amici* have found that current dispositional laws in twenty-two states, including Illinois, list placements with relatives as one of the options for placement of neglected and dependent children. *E.g.*, Ariz. Rev. Stat. § 8-241; Colo. Rev. Stat. § 19-3-111; Fla. Stat. Ann. § 39.11; Ill. Rev. Stat. ch. 37, § 705-7; Md. Cts. & Jud. Proc. Code Ann. § 3-820; Mont. Rev. Codes Ann. § 10-1314; N.C. Gen. Stat. § 7a-286. Under Florida law, custody of a dependent child must be given to a close relative if one is able and willing to accept responsibility. Fla. Stat. Ann. § 39.10(6).

The Illinois Department of Children and Family Services has issued regulations which state that "relative resources should be explored for all children for whom placement is indicated with the exception of children relinquished for adoption." Illinois Department of Children and Family Services, Placement Manual pt. 5 (1972) (Appendix 37-40).

not specifically mentioned, no state bars the placement of neglected children with their relatives, and many placement authorities prefer relative placements where they are available.

For the reasons stated in Part II of this brief, *Amici* believe that care in relatives' homes may be the most desirable form of temporary care for many neglected children. The refusal of some states to provide foster care assistance for relative placements, however, severely restricts the use of relatives for out-of-home care for neglected children. Even where they would like to assume responsibility, many relatives cannot afford to serve as foster parents, especially for extended periods, without the additional support provided under AFDC-FC.[7] In addition, child placement authorities are often reluctant to place children with relatives, even where it would otherwise be desirable, since sig-

[7] To be eligible for the AFDC-FC program, a child must have been living in a home that was receiving or was eligible for public assistance prior to his or her removal. Relatives who might take responsibility for their care are therefore also very likely to be disadvantaged. Hill, Informal Adoption Among Black Families 61-66 (1977); Stack, All our Kin: Strategies for Survival in a Black Community 32-33 (1974).

Relatives who would like to care for neglected children often must refuse to do so because they cannot afford the additional expense, especially where long-term care may be necessary. Thus, one study of children entering formal foster care for the first time in 1966 found that 30% of the children were living with relatives prior to formal placement. Based on interviews with these caretakers, the authors concluded that "the cessation of care was a reaction to the fact that temporary care had been expected, but the extended period during which care was needed went beyond the capacity of the substitute. This often occurred despite positive attitudes toward the child and a real concern about his future." Jenkins and Norman, Filial Deprivation and Foster Care 72, 89-90 (1972).

nificantly less financial assistance will be made available to meet the child's needs than if the child were placed in the home of a stranger.[8]

In light of the importance of allowing the placement of neglected children with relatives, the recognition of relative placements under state law, and the inability of many relatives to provide care for neglected children without the assistance provided under the AFDC-FC program, it is inconceivable that Congress would have excluded relative placements from the foster care program. For the reasons that follow, *Amici* contend that Congress in fact enacted no such exclusion, and that the courts below correctly held that relative placements must be covered under the AFDC-FC program.

SUMMARY OF ARGUMENT

1. Section 408 of the Social Security Act, 42 U.S.C. § 608, provides assistance in the form of foster care payments for any eligible child who is placed in a "foster family home of any individual" or in a child-care institution. 42 U.S.C. § 608(b)(1)-(2). Section 408(f) of the Act defines the term "foster family home" to mean "a foster family home for children which is licensed by the State in which it is situated

[8] The maximum monthly AFDC payment for a dependent child is less than the average monthly AFDC-FC payment per child in a foster family home in most states for which data are available. *E.g.*, Alabama ($59/$95), California ($175/$220), Louisiana ($50/$152), Mississippi ($30/$121), and North Dakota ($81/$155). *See*, HEW, Social Security Administration, Office of Research and Statistics, *Public Assistance Statistics, October 1977* 12 (March 1978); HEW, Social Security Administration, Office of Research and Statistics, *Aid To Families with Dependent Children, July 1977* 6 (March 1978).

or has been approved, by the agency of such State responsible for licensing homes of this type, as meeting the standards established for such licensing." 42 U.S.C. § 608(f). This language is extremely broad and gives no indication that Congress intended to exclude any suitable homes in which foster children might be placed by a juvenile court or other child placement agency.

The background and legislative history of the AFDC-FC program further demnostrate that Congress intended the phrase "foster family home" to include any family placement that is determined by child placement authorities to be in the best interests of the child, including placements in the homes of relatives. The AFDC-FC program was enacted in response to the refusal in 1961 by Secretary of Health, Education and Welfare Arthur Flemming to permit states to disqualify children from the basic AFDC program because their homes were regarded as unsuitable by the state. These suitable home policies were intended to protect the welfare of children receiving public assistance under the AFDC program. In their place, Congress established the AFDC-FC program to make it possible for states to remove AFDC children from unsuitable homes and to place them into foster care that was determined to be in their best interests.

The legislative history of the AFDC-FC program makes clear that Congress' overriding concern was that neglected children receive care that is determined by child placement authorities to be in their best interests. Senator Kerr, who sponsored the program in the Senate in 1961, made this clear when he stated that the program "does not in any way change whatever the

law may be in a State with reference to the authority of a court, on the one hand, taking a child from its natural home, and on the other hand placing it in a foster home." 107 Cong. Rec. 6386 (April 20, 1961). Similarly, when the program was made permanent in 1962, Congress extended assistance to foster children who were placed in child care institutions so that placement authorities would not be hampered in selecting the placement that was best suited to the needs of each individual child. Finally, in 1967, Congress increased the level of federal support for the AFDC-FC program in order to "facilitate plans being developed for children based on the need of the child rather than the fiscal condition of the local government." H.R. Rep. No. 544, 90th Cong., 1st Sess. 101 (1967); S. Rep. No. 744, 90th Cong., 1st Sess. 165 (1967).

This history makes clear that the term "foster family home" in section 408 includes, as its language suggests, any family placement that has been judicially or administratively determined to be in the best interests of a neglected child, including placements in the homes of relatives. Appellants' arguments to the contrary are not persuasive. Coverage of relative placements under AFDC-FC would not duplicate the AFDC program, since AFDC-FC is limited to children who have been removed by a court from their homes and whose placements are under the supervision of the state. Many children living with relatives under informal arrangements, who are eligible for AFDC, would not be eligible for AFDC-FC. In addition, AFDC-FC provides assistance and services to meet the special needs of neglected children that are not available under the AFDC program.

Finally, although the AFDC-FC program extended federal assistance to children placed with strangers who would no longer be eligible for AFDC because of their removal from their homes, there is no reason to believe that this was the only purpose of the program. It is wrong to assume that the program merely provides the same benefits as the AFDC program to a new group of children; in fact, the protections afforded by the AFDC-FC program appear to have been adopted specifically with relative placements in mind.

2. *Amici* do not contend that placements with relatives are in the best interests of every neglected child. However, placements with relatives are so often more desirable than placements with strangers or in institutions that Congress could not have intended to exclude such placements from the AFDC-FC program.

Placements with relatives may mitigate many of the problems associated with care in the homes of strangers and in institutions. The child's prior acquaintance with the relatives can reduce the trauma of separation and the loss of identity that occurs when children are placed in totally unfamiliar settings. In addition, emotional ties and a sense of trust may already exist between the relative and the child, so that the child is able to receive needed support without having to build new relationships during the time of crisis. Moreover, because of the traditional role in our society of extended families in child-rearing, relative placements may avoid the profound sense of uncertainty that makes it difficult for many foster children and nonrelated foster parents to develop the meaningful, supportive relationships that the children so desperately need.

Relative placements may also improve the likelihood that the children will be returned to their natural homes, since relative placements often make it easier for the parents to maintain contacts with the children and to continue to participate in important decisions regarding their lives. Finally, relative placements may avoid the pattern of multiple placements, with repeated separations, that may be the most damaging characteristic of foster care. Relatives are often more likely to care for children with special needs and older children, rather than request that such children be removed after problems develop. In addition, relatives may be less likely to experience the frustrations that cause many non-related foster parents to request that children be transferred from their homes after short periods.

ARGUMENT

I. NEEDY NEGLECTED CHILDREN WHO ARE PLACED BY COURTS IN THE HOMES OF RELATIVES ARE ENTITLED TO RECEIVE ASSISTANCE UNDER THE AFDC-FC PROGRAM EVEN THOUGH THEY ARE ALSO ELIGIBLE UNDER THE BASIC AFDC PROGRAM.

A. The AFDC-FC Program Provides Assistance For Any Out-Of-Home Family Placement That Is Determined By Child Placement Authorities To Be In The Best Interests Of The Child, Including Placements With Relatives.

The AFDC-FC program provides assistance to children who are removed from the homes of their parents or other relatives specified in section 406(a) of the Social Security Act after a judicial determination that continuation in the home would be contrary to the child's welfare. 42 U.S.C. § 608(a)(1). To be eligible, the child must have been receiving or been eligible for AFDC assistance in the month that the judicial pro-

ceedings began or within six months prior thereto. 42 U.S.C. § 608(a)(1). In addition, the child's placement and care must be the responsibility of the state welfare agency or another public agency that has an agreement with the welfare agency to carry out the requirements of the statute. 42 U.S.C. § 608(a)(2).

AFDC-FC provides assistance for care in a "foster family home of any individual" or in a child-care institution. 42 U.S.C. § 608(b)(1)(2). Section 408(f) of the Social Security Act defines the term "foster family home" to mean "a foster family home for children which is licensed by the State in which it is situated or has been approved, by the agency of such State responsible for licensing homes of this type, as meeting the standards established for such licensing." 42 U.S.C. § 608(f). This language is extremely broad and gives no indication that Congress intended to exclude any suitable homes in which foster children might be placed.[9] The background and legislative history of the program further demonstrate that Congress intended the phrase "foster family home" to include any placement that is determined by a child placement authority to be in the best interests of the child, including placement in the home of a relative.

The AFDC-FC program was enacted in response to a ruling in 1961 by Secretary of Health, Education and Welfare Arthur Flemming that states could no longer disqualify children from the basic AFDC pro-

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[9] In contrast to the unrestricted language defining foster family homes, section 408(f) expressly excludes public institutions from the definition of child-care institution. 42 U.S.C. § 608(f). Thus, to the limited extent that Congress has wanted to restrict the types of foster placements that are eligible under the AFDC-FC program, it has done so in section 408(f) and not elsewhere in the statute.

gram because their homes were regarded as unsuitable by the state. *King* v. *Smith,* 392 U.S. 309, 323-324 (1968). While these suitable home policies often focused on the immoral behavior of the mothers or other relatives with whom the child was living, their orgiinal purpose was to protect children receiving AFDC against neglect or abuse.[10] W. Bell, Aid to Dependent Children 3 (1965). Thus, the first federal instruction to state welfare agencies regarding suitable home rules stated:

> Many state plans for Aid to Dependent Children require that the state agency shall determine that conditions in the home in which a child will live will protect the interests and promote the welfare of a dependent child. Such a provision is in keeping with the purpose of the federal Act. Under the direction of persons trained and experienced in family or child welfare, objective standards of health and care should be established and the application of such standards in particular situations carefully supervised.

Bureau Circular No. 9, Sec. 209 at 1 (May 1, 1940).[11]

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[10] A number of specific requirements in the AFDC program derive from the responsibility of the State to protect children who are receiving assistance. For example, section 402(a)(16), 42 U.S.C. § 602(a)(16), requires that where a state agency has reason to believe that the home in which a relative and child receiving aid reside is unsuitable for the child because of the neglect, abuse, or exploitation of the child, the agency must bring this fact to the attention of the appropriate court or law enforcement agencies. Section 406(b)(2), 42 U.S.C. § 602(b)(2), permits AFDC payments to be made to a person, other than the child's parent or caretaker, where the welfare agency determines that the parent or other caretaker is unable to manage funds in the interests of the child's welfare.

[11] In proposing a model suitable home policy for adoption by the states, the American Public Welfare Association similarly explained

Congress approved the Flemming Ruling a few months after it was issued, although it extended the deadline for state compliance to September 1, 1962. 75 Stat. 77, 42 U.S.C. § 604(b). At the same time, Congress enacted the AFDC-FC program as a temporary measure to make it possible to place AFDC children in suitable homes. Thus, the Senate Report stated:

> The objective of the aid to dependent children program is to provide such assistance for needy children in their own homes. As is true of other children, there are some home environments that are clearly contrary to the best interests of these children. The situation is particularly pointed up by the fact, noted earlier in this report, that the States have placed in operation statutes terminating payment when a child's home is found unsuitable because of the immoral or negligent behavior of the parent. Often, however, remedial action on behalf of the child was not possible. We believe that this undesirable situation could be avoided, in many instances, if assistance under this program were available for the care of the child in a foster family home when such care is necessary.

S. Rep. No. 165, 87th Cong., 1st Sess. 6 (1961).

There were several clear indications during the debates on the AFDC-FC program that Congress' intended neglected children to be able to receive the kind

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that the purpose of the policy was to improve the quality of home life for AFDC children:

> The maintenance of proper home environment for dependent children is vital to the success of any child welfare program. The provision for assistance under this Act affords a unique opportunity to raise the standards of home care. This feature should be stressed in the drafting of this legislation.

American Public Welfare Association, Suggested State Legislation for Social Security 26 (1935), quoted in Bell, *supra* at 30.

of care determined by child placement authorities to be in their best interests. Thus, Senator Kerr, who was the program's chief supporter on the floor of the Senate, stated that the program "does not in any way change whatever the law may be in a State with reference to the authority of a court, on the one hand, taking a child from its natural home, and on the other hand placing it in a foster home."[12] 107 Cong. Rec. 6386 (April 20, 1961). He also stated that the program's purpose was to ensure that courts "would be free to consider the situation as to the welfare of the child." *Id.* at 6387. Senator Byrd similarly stated that the program was intended to develop "the most suitable care for children who have to be provided for outside their own homes." *Id.* at 6388.

In 1962, Congress made the AFDC-FC program permanent, and it also expanded the program to permit children to be placed in child-care institutions as well as in foster family homes. Pub. L. 87-543, §§ 131(b), 135, 76 Stat. 172. The House Committee report stated that child-care institutions were added to the program "so that whatever facility is most appropriate for a particular child may be used." H.R. Rep. No. 1414, 87th Cong., 2d Sess. 17 (1962). Similarly, Senator McCarthy, who successfully proposed the child-care institution amendment on the floor of the Senate after it had been rejected in committee, explained the purpose of the change as follows:

> The issue is whether the Federal Government is going to place restrictions on programs which limit the courts from making a placement in the best interest of the child, forcing him to remain in a home which has been determined as an unsuitable placement.
>
> This amendment—and the House approved provision—opens the way for the courts to make a determination in the best interest of the child....
>
> I do not believe we want to extend Federal participation to the child whose home is unsuitable only if he is placed in a foster family home and deny it where the court determines it is in his best interest to be transferred to a child care institution.

108 Cong. Rec. 12693 (July 3, 1962). At the same time, Congress amended Section 408 to enable child placement decisions to be made by youth courts or any other state or local agency, instead of by the welfare department, as had been required under the temporary program. Pub. L. 87-543, § 155(a); 42 U.S.C. § 608(a)(2)(B).

Finally, in 1967, Congress increased the level of federal participation for foster care payments after it heard evidence that welfare agencies found it difficult to recruit adequate foster homes at current rates. *Hearings on the Social Security Amendments of 1967 (H.R. 5710) Before the House Comm. on Ways and Means*, 90th Cong., 1st Sess. 1529, 1536, 1783, 1984 (1967); *Hearings on the Social Security Amendments of 1967 (H.R. 12080) Before the Senate Comm. on Finance*, 90th Cong., 1st Sess. 1301-02 (1967). The House and

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[12] Senator Kerr's statements were made in response to questions from Senators Keating and Javits whether the new program would interfere in any way with the practice of some states of placing children in foster homes conducted by religious organizations. 107 Cong. Rec. 6386-7 (4-20-61). He also concurred in statements by Senator Javits that the program "does not attempt to fix policies in effect under the laws of any State as to the taking of a child from its natural home and placing it in a foster home," *Id.*, and that under the program the foster home would be "selected by the court." *Id.*

Senate Reports both stated that this increase was necessary to "facilitate plans being developed for children based on the need of the child rather than the fiscal condition of the local government." H.R. Rep. No. 544, 90th Cong., 1st Sess. 101 (1967); S. Rep. No. 744, 90th Cong., 1st Sess. 165 (1967). In presenting the proposal to the House, Representative Byrnes stated that the more liberal payments were intended to "permit more emphasis on the welfare of the child and less on economic considerations," 113 Cong. Rec. 23062 (August 17, 1967), and Representative Ullman stated "our report encourages State welfare agencies to obtain the best possible environment for the foster child." *Id.* at 23071.

This history makes clear that throughout the development of the AFDC-FC program Congress has consistently sought to make it possible for juvenile courts and other child welfare authorities to select out-of-home care that is best suited to the needs of each neglected child.[13] The term "foster family home" in section 408 must therefore include, as its language suggests, any family placement that has been judicially or administratively determined to be in the child's best interests. The exclusion of relative placements from a state's AFDC-FC program conflicts with that definition and therefore violates the Social Security Act.

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[13] The exclusion of placements in public child-care institutions from the AFDC-FC program, *supra* note 9, is not inconsistent with this history. The availability of care in public institutions does not depend upon federal support, since the financing of institutions for children and juveniles has traditionally been the responsibility of the state.

B. Coverage Of Relative Placements Under The AFDC-FC Program Does Not Duplicate The Basic AFDC Program, Nor Is The AFDC-FC Program Limited To Children Who Are No Longer Eligible For Assistance Under The Basic AFDC Program.

Despite the broad statutory language and clear legislative history of the AFDC-FC program, appellants contend that placements with relatives are not included within the definition of foster family home for two reasons. First, they argue that the inclusion of children living with relatives in AFDC-FC would duplicate the basic AFDC program. Second, they contend that AFDC-FC was intended only to cover children who otherwise would have lost their eligibility for federal support when they were removed from an AFDC home. Since children placed with relatives remain eligible under the basic AFDC program, appellants contend they were not intended to be covered. *Amici* contend that neither of these arguments is correct.

1. Inclusion of children living with relatives in the AFDC-FC program would not duplicate the basic AFDC program, since eligibility for and the assistance provided by the two programs are both vastly different. The foster care program is available only for those children who have been found by a court to be living under conditions that are detrimental to their welfare, 42 U.S.C. § 608()(1); and the placement and care of these children must be under the supervision of the state welfare agency or another public agency. 42 U.S.C. § 608(a)(2). Children who are living in the homes of relatives under informal arrangements without a court order or agency supervision are thus not eligible for AFDC-FC, although they may be eligible for AFDC.

Furthermore, the Act mandates that foster children receive special services to allow them to return to the the homes from which they were removed or to a more permanent placement outside of their homes. 42 U.S.C. § 608(f). These services are not required for AFDC children living with relatives. Also, in recognition of the special needs of neglected children and the higher costs of caring for children under state supervision,[14] the AFDC-FC program has since its inception in 1961 made it possible for states to provide greater financial assistance for foster children than for children under the basic AFDC program.[15] Thus, AFDC-FC makes it possible for neglected children to receive additional assistance and services that they cannot receive under the basic AFDC program.

2. Although Congress clearly recognized that the AFDC-FC program would provide assistance to children placed with strangers who otherwise would have become ineligible for federal aid, there is no reason to

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[14] Congress recognized in 1961 that AFDC-FC payments would be determined "according to State standards as to the appropriate amount needed for such care," S. Rep. No. 165, *supra* at 7, not necessarily upon the amounts paid under AFDC. As a result, states generally paid more for children under the AFDC-FC program than under AFDC. In 1967, Congress increased the level of federal participation in foster care payments because "foster family care is more costly than care in the child's home." H.R. Rep. No. 544, *supra* at 101; S. Rep. No. 744, *supra* at 164.

[15] Higher payments are necessary because neglected and abused children who are removed from their homes by court order have special needs that distinguish them from other children. They often need special medical attention, nutritional supplements, psychological care or educational programs to make up both for the deprivations that they have suffered in the past and for the trauma of the separation itself. In addition, foster homes must meet the additional costs necessary to satisfy state licensing requirements.

believe that Congress intended this to be the program's only purpose, as appellants contend.[16] This argument erroneously assumes that the AFDC-FC program merely duplicated the AFDC program for a new group of children, rather than providing special assistance and services that are not provided under AFDC. Since neglected children who are placed with their relatives have the same needs as children who are placed with strangers, and since related foster parents have the same responsibilities as non-related foster parents, it is wrong to assume that children placed with relatives had no need for the new program. Furthermore, in at least two instances, the protections afforded by the AFDC-FC program appear to have been adopted with relative placements specifically in mind.[17]

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[16] Appellants rely on the language of section 408(a)(1), which they contend demonstrates that Congress intended the AFDC-FC program only to reach children who would no longer be eligible for AFDC. However, the legislative history of the 1961 Act makes clear that the purpose of section 408(a)(1) was to insure that the program only was available for children who became eligible after April 30, 1961, since Congress wanted the program to extend to new placements, not to those that were already in existence. S. Rep. No. 165, *supra* at 7.

[17] Section 408(a)(4)(B)(i) of the Act, 42 U.S.C. § 608(a)(4)(B)(i), is also inconsistent with appellants' argument that AFDC-FC was intended only to provide assistance to children who would otherwise lose AFDC benefits because of their removal from the home of a parent or relative. Under that section, a child is eligible for AFDC-FC whether or not he or she was actually receiving AFDC benefits, so long as he or she was eligible for assistance at the time court proceedings were begun. If Congress intended the program only to replace benefits that would be lost by the child's removal from an AFDC home, it would have had no reason to cover children who were not receiving AFDC benefits when they were removed.

First, section 408 protects neglected children by requiring that placements must be in foster family homes that are licensed *or approved* by the state.[18] 42 U.S.C. § 608(f). The approval mechanism was apparently added to safeguard children placed in the homes of relatives, since a number of states, like Illinois, do not require relatives to be licensed as foster homes.[19]

[18] Under Illinois law, homes of relatives are exempted from the requirement of receiving a license before they may care for children. This is not because the state wishes to prevent children from being placed with relatives, but because it does not believe relatives should be encumbered by the licensing requirements. *Youakim* v. *Miller*, 562 F.2d 483, 488 n.6 (7th Cir. 1977). In this case, both of the lower courts found that the Youakim family had been approved as meeting the state's standards for foster family homes. *Id.* at 488. Therefore, this case does not present the question whether a state may exclude relatives from the AFDC-FC program by prohibiting the placement of children in such homes altogether.

[19] While AFDC assistance was available prior to 1961 for children living with certain relatives, 42 U.S.C. § 606(a), there had long been concern that, in order to save money, states would remove children from institutions and place them indiscriminately with relatives without considering the needs of the child or the conditions of the home. W. Bell, *supra* at 21. Thus, the federal policy regarding suitable homes stated:

> A special responsibility exists with respect to children who may be removed from an institution or a foster home to the home of a relative who might be eligible to receive public assistance for their care under the Aid to Dependent Children program. Placement of children even in the home of a relative warrants special care in protecting the interests of the child by use of the essential skills that have been developed in the field of child placement.

Bureau Circular No. 9, *supra*. This concern apparently motivated the drafters of the AFDC-FC program to require that relative homes satisfy state standards even though they were not required to be licensed.

Second, in the years immediately preceding passage of the AFDC-FC program, a number of states had adopted procedures for the "voluntary" placement of AFDC children with relatives in cases where the parents' homes were found unsuitable. W. Bell, *supra* at 124-136. In these states, many welfare mothers were coerced into placing their children with relatives, although a court might not have ordered the children's removal had formal proceedings been initiated. *Id.* In order to protect the rights of parents, section 408 (a)(1) mandates that eligible children may only be removed from the AFDC home by court order. S. Rep. No. 165, *supra* at 7. Adoption of this safeguard further indicates that Congress expected placements with relatives to be covered under AFDC-FC.[20]

In sum, neither of the arguments made by appellants for limiting the scope of the AFDC-FC program is supported by the scheme of the program. Instead, the statutory language should be given its full breadth by applying it to all out-of-home family placements that are determined by a juvenile court or other child placement agency to be in the best interests of the child, including placements with relatives.

II. THE EXCLUSION OF CHILDREN LIVING WITH RELATIVES FROM THE AFDC-FC PROGRAM DENIES MANY NEGLECTED CHILDREN THE PLACEMENT THAT IS BEST SUITED TO THEIR NEEDS

The selection of the most suitable placement for a child who has been removed from his or her home

[20] The problem of coerced placements still exists. *See Smith* v. *Organization of Foster Families*, 431 U.S. 816, 834 (1977); Mnookin, *supra* at 601 (1973); Wald, *supra* at 626 n. 4; Levine, *Caveat Parens: A Demystification of the Child Protection System*, 35 U. Pitt. L. Rev. 1, 23 (1973).

should depend upon the individual needs of each child and the family situation that caused the removal. Placement with relatives is not in the best interests of every neglected child, nor are relatives always available when placement with them would be preferable.[21] Nevertheless, *Amici* contend that placements with relatives are so often more desirable than placements with strangers or in institutions that Congress could not have intended to exclude such placements from the AFDC-FC program.

Neglected children who are removed from homes by court order are often the most vulnerable children in our society. Not only have they suffered the economic, physical and psychological deprivations that caused their removal, they face the trauma of separation from the few people, institutions or surroundings on whom they have depended for support. Mnookin, *supra* at 623-624.[22] Even where they have been removed from unsuitable homes, separation from parents is extremely painful to children. J. Goldstein, A. Freud & A. Solnit, Beyond the Best Interests of the Child 20 (1973).

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[21] Many neglecting or abusing parents, for example, are isolated from their relatives. Giovannoni & Billingsley, *Child Neglect Among the Poor: A Study of Parental Inadequacy in Families of Three Ethnic Groups*, 49 Child Welfare 196 (1970).

[22] Esther Hill has described the situation of a foster child in the following terms:

> Everything the child has known in the past disappears. Everything he experiences is strange—the bed he sleeps in, the location of the bathroom and the closet for his clothes, the food, the family routine, the toys, the yard, the school, the people in close proximity to him. Nothing which happens from day to night is the same and there is no person to look to for a familiar response.

Hill, *Is Foster Care the Answer?*, 15 Pub. Welf. 67, 69 (1957).

Moreover, foster children experience profound misgivings about their own identities and crippling conflicts of loyalty to their parents. Kadushin, Child Welfare Services 425-429 (2d ed. 1974); Wald, *supra* at 645; Mnookin, *supra* at 624-25; Buxbaum, *The Problem of Separation and the Feeling of Identity*, Child Welfare 8 (1955).

Generally, placements with relatives are more likely than placements with non-relatives to permit foster children to overcome these harms. The child's prior acquaintance with the relatives may reduce the trauma of separation and the loss of identity that occurs when children are placed in a totally unfamiliar setting.[23] In addition, emotional ties and a sense of trust may already exist between the relative and the child, so that the child is able to receive needed support without having to build entirely new relationships during the time of personal crisis. Finally, children may be better able to accept the love and direction of their relatives without having to question their loyalty to their natural parents.

Clinical studies have shown that foster children very often suffer a profound sense of uncertainty caused by the unplanned nature of their placement and by its deliberate impermanence. Because foster care is intended

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[23] Relatives may also be more likely to accept all of the siblings in a family in order to keep the family together. The presence of siblings can be an important factor in allowing foster children to adjust to their new surroundings and to the separation from their home. Aldridge and Cautley, *Foster Home Placements of Siblings*, 55 Child Welfare 85, 91 (1976). Placement with relatives may also avoid disruption in cultural or religious values, which is important in helping to maintain the child's sense of identity. Erikson, Identity: Youth and Crisis 21-25 (1968).

to be temporary, *Smith* v. *Organization of Foster Families, supra,* 431 U.S. at 823-24, the children and foster parents often spend long periods in emotional limbo, not willing or able to develop close and trusting relationships that could help the child develop. Kadushin, *supra* at 434. Thus, based on a study of 144 foster children, Bryce and Ehlert concluded

> . . . that no child can grow emotionally while in limbo, never really belonging to anyone except on a temporary and ill-defined or partial basis. He cannot invest except in a minimal way (just enough to survive) if tomorrow the relationship may be severed. . . . To grow the child needs at least the promise of permanence in relationships and some continuity of environment.

Bryce and Ehlert, *144 Foster Children,* 50 Child Welfare 499, 503 (1971). This is in part due to the foster parents' own feelings of ambiguity:

> The foster parents cannot summon up the conviction to convey to the child convincingly that he belongs to them, that they expect certain things of him, and at times, demand things of him. Even if such intensity were posible, it would mislead the child in view of his ever impending departure. In the absence of a final sense of belonging and investment, effectiveness of authority inherent in the parent-child relationship is missing . . . familial identification is not possible.

Id.

Placements with relatives cannot, of course, totally avoid the shallowness caused by the uncertainty and temporariness of foster placements. But they may be able to minimize these effects, largely because in our society relatives are traditionally accepted as having

an important role in raising and caring for children.[24] As Mr. Justice Powell wrote last term,

> Ours is by no means a tradition limited to respect for the bonds uniting the members of the nuclear family. The tradition of uncles, aunts, cousins, and especially grandparents sharing a household along with parents and children has roots equally venerable and equally deserving of constitutional recognition. Over the years millions of our citizens have grown up in just such an environment, and most, surely have profited from it. Even if conditions of modern society have brought about a decline in extended family households, they have not erased the accumulated wisdom of civilization, gained over the centuries and honored throughout our history, that supports a larger concept of the family. Out of choice, necessity, or a sense of family responsibility, it has been common for close relatives to draw together and participate in the duties and the satisfactions of a common-home. Decisions concerning child rearing . . . long have been shared with grandparents or other relatives who occupy the same household—indeed who may take on major responsibility for the rearing of children. Especially in times of adversity, such as the death of a spouse or economic need, the broader family has tended to come together for mutual sustenance and to maintain or rebuild a secure home life.

Moore v. *City of East Cleveland, Ohio,* 431 U.S. 494, 504-505 (1977).

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[24] Recent studies have documented the extensive informal fostering patterns among relatives in the black community. *See, e.g.,* Hill, Informal Adoption Among Black Families (1977); Stack, All Our Kin: Strategies for Survival in a Black Community (1974). Increasing numbers of relatives, however, may be finding it difficult to assume such responsibility in view of rising rates of inflation and unemployment. Hill, *supra* at 72.

An important goal of foster placements, recognized in section 408(f) of the Act, is the return of the children to their parents. Foster placements with relatives may make it more likely that this goal will be achieved. The most important reason for this is that the likelihood of a child's returning to his or her natural parents is directly related to the number and frequency of contacts between the parents and the child during placement.[25] Fanshel and Shinn, Children in Foster Care 93-9 8(1978); Fanshel, *Parental Visiting of Children in Foster Care; Key to Discharge?*, 49 Soc. Serv. Rev. 493 (1975).[26]

Placement with relatives may encourage parent-child contacts because parents may feel more comfortable and welcome in the home where their children are living.[27] Non-relative foster parents may resent the parents or be threatened by them and therefore may wish to avoid contact as much as possible. Kadushin, *supra* at 442-445; Shapiro, Agencies and Foster Children 44 (1976); Littner, *The Importance of the Natural Parents To the Child in Placement*, 54 Child Welfare 175, 176 (1975). Relatives may also be more willing to arrange visits to fit the parents' schedules, and to allow the parents to participate in decisions regarding the children while they are living apart.[28]

Finally, although in theory foster children who cannot be returned to their homes are supposed to be given a new permanent home through adoption, the reality is that most foster children remain in foster care for long periods without any formalized permanent placement.[29] Many of these children experience a series of short-term placements, as they are repeatedly moved from one home to another.[30] The psychological harm caused

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[25] Contact with biological parents has also been found to improve the child's initial adjustment in the foster home. Kadushin, *supra* at 441-442, 452; Weinstein, The Self-Image of the Foster Child 17 (1960); Wald, *supra* at 647 n. 115, 678, 680-81.

[26] Placement with relatives may also facilitate the return of foster children to their parents in a more subtle way. As this Court noted in *Smith* v. *Organization of Foster Families, supra,* where a child is living with a more affluent foster family, as is often the case, there may be a bias on the part of agency personnel and courts to presume that continuation of the placement will be in the best interests of the child, even though no harm will result to the child from being returned to his or her home. 431 U.S. at 834. Placements with relatives are likely to be less subject to these pressures against returning foster children to their natural families.

[27] There is evidence that parents who are separated from their children prefer placements with relatives. Leichter and Mitchell, Kinship and Casework 115-116, 239 (1969).

[28] Until parental rights have been terminated, the parents retain the right to participate in many decisions regarding the child's care. *Smith* v. *Organization of Foster Families, supra,* 431 U.S. at 827-828; Wald, *supra* at 632.

[29] Based on available data, Wald estimated that between 40 and 80 percent of all children presently removed from home by court order are never returned to their parents. Wald, *supra* at 662. The chances of return are greatest in the first year after removal, and they diminish considerably after that point. *Id.* The Children's Defense Fund in its survey of child welfare offices in 140 counties found that over 52% of foster children remained in care for more than two years, and 33% for more than four years. Other studies have found the average foster placement to last about five years. Vasaly, Foster Care In Five States: A Synthesis and Analysis of Studies from Arizona, California, Iowa, Massachusetts and Vermont 23 (1976); Fanshel and Grundy, Computerized Data for Children in Foster Care: First Analyses from a Management Information System in New York City 7 (1975).

[30] The record in *Smith* v. *Organization of Foster Parents, supra,* showed that nearly 60% of the children in foster care in New York City had experienced more than one placement, and about 28% had experienced three or more. 431 U.S. at 837. The CDF survey of child welfare offices in 140 counties found that 46% of the children in care had more than one placement. Data from studies of foster care in Arizona, California, Iowa and Massachusetts revealed similar placement patterns. Vasaly, *supra* at 55-57.

by these repeated separations may be the most damaging aspect of the current foster care system.[31]

Placements with relatives may mitigate the problems of multiple placements in foster care. Relatives may be more willing to care for children who have behavior problems or other special problems, Wald, *supra* at 697, and for older children, whereas strangers often do not want to keep such "problem" children. As a result, these children are placed inappropriately. They must often be moved from home to home, ending up in institutions or group homes. Citizens' Committee for Children of New York, Group Homes for New York City Children 3 (1976). In addition, because they may have an easier time developing close relationships to the children, relatives may not experience the same frustrations that cause many non-related foster parents to

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[31] The psychological damage done to children by repeated transfers has been described by Kadushin:

> Removal from one foster home and replacement in another imposes on the child the emotional burden of repeated separation and change. Every replacement reactivates, and hence reinforces, previous separation and rejection experiences and tends to confirm for him any predisposition he may have to regard himself as unacceptable to others. It increases the child's difficulty in determining who he is and where he belongs and in establishing a stable sense of identification. It is likely to increase his lack of trust in parental figures. The child is afraid to invest himself in relationships with others because of the experience of hurt, and such relationships are maintained at a shallow level. Frequent replacement makes it more likely that the child will manifest emotional problems and that subsequent placement will fail.

Kadushin, *supra* at 445. Summarizing the available literature, Wald found three ways in which children are injured by unstable placements: (1) each separation involves the breaking of attachments that cause insecurity and makes it more difficult to form future attachments; (2) separation destroys continuities that are important to the child's development; (3) the child's uncertain status may cause its own psychological damage. Wald, *supra* at 667-668. *See generally*, J. Goldstein, A. Freud & A. Solnit, *supra*.

request that foster children be removed from their homes:[32]

> The foster parents frequently ask for the child's removal from the foster home. This request comes either because the emotional or adjustment problems emerging out of the incessant and endless uncertainty of it all, or from the foster parents' sheer frustration over the refusal of responsible adults . . . to make decisions that would result in a more permanent arrangement for the child.

Bryce and Ehlert, *supra* at 500.

Despite the advantages of relative placements, many relatives cannot afford to care for neglected children if they only receive AFDC payments. These relatives would be better able to accept responsibility if they could receive the higher payments available under AFDC-FC.[33] Thus, the issue in this case is *not* under which program—AFDC or AFDC-FC—children living with relatives may be covered. The real issue for the children affected is whether they will be able to live with relatives who want to care for them, or whether they will end up in institutions and the homes of strangers. As *Amici* have shown, this choice is critical for thousands of neglected children for whom placements with relatives may offer the best opportunity for healthy development.

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[32] In *Smith* v. *Organization of Foster Families, supra*, evidence showed that as many as one-third of all transfers within the foster-care system in New York are at the request of the foster parents. 431 U.S. at 826 n. 15. *See also*, Vasaly, *supra* 99-103.

[33] Studies have shown a positive relationship between the payment level for foster homes and the number of foster homes available. *See, e.g.*, Simon, *The Effect of Foster-Care Payment Levels on the Number of Foster Children Given Homes*, 49 Soc. Serv. Rev. 405, 410 (1975) (doubling the foster child payment level would increase the number of foster homes by 50 to 100 percent).

CONCLUSION

For the foregoing reasons, the decision of the Court of Appeals should be affirmed.

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